BRICKWOOD'S

SACKETT
ON
INSTRUCTIONS TO JURIES

CONTAINING A TREATISE ON

JURY TRIALS AND APPEALS

WITH

FORMS OF APPROVED INSTRUCTIONS AND CHARGES
ANNOTATED
ALSO ERRONEOUS INSTRUCTIONS WITH COMMENT OF
THE COURT IN CONDEMNING THEM

THREE VOLUMES
VOL. I

THIRD EDITION

BY
ALBERT W. BRICKWOOD, LL. B.
OF THE CHICAGO BAR

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TO THE

TRIAL LAWYER,

IN THE HOPE THAT IT MAY LESSEN HIS LABOR
AND KEEP HIM FROM ERROR
THIS REVISION IS RESPECTFULLY DEDICATED.

By the Reviser.

PREFACE TO THE THIRD EDITION.

In presenting this edition of SACKETT'S INSTRUCTIONS TO JURIES, it is proper to explain the scope and aim of the work.

At the outset, it is apparent that a work of this kind should contain a brief treatise on trials by jury, which should embrace the empaneling of the jury, the opening statement of counsel, the examination of witnesses, the arguments of the attorneys and the instructions by the court. It should also cover the preparation of bills of exception, the record for appeal, abstracts and briefs in the appellate courts. In other words, it should take the trial lawyer from the opening of the trial to the end of the proceedings in the court of last resort.

This manifestly would have no reference to the pleadings in the case and would only incidentally bear upon rules of evidence. It would not supersede the excellent works on trials already published suitable for students, but would aim to supply the busy trial lawyer with an epitome of the subject in a comprehensive but concise form.

The forms of instructions seem to be the great stumbling block of both bench and bar. This is not so much from the lack of precedents, for the reported cases abound in them, as from the want of books of precedents, pointing out not only what the reviewing courts have approved or disapproved, but where such decisions may be found. An instruction, after it has been submitted to the jury in a given case, may be assailed upon a motion for new trial with all the skill and ingenuity that opposing counsel, who have studied it for days or even weeks, can command. Defects more apparent than real are magnified to such an extent that even the supporting counsel and the court, having had no previous notice of the grounds upon which error would be assigned, are taken by surprise, and being without precedents to sustain it, they are ready to concede error without a contest, and the fruits of a well earned verdict, in a meritorious cause, are lost. Whereas, if such a book were at hand, it might be a matter of but a few moments to turn to cases where

similar instructions in parallel cases had been approved. Counsel could then come prepared to cite authorities supporting all instructions asked and given, and sustaining the court in refusing erroneous instructions. With such a book, an attorney could easily turn to authorities holding a given instruction erroneous if such it proved to be.

A book of this kind should give not only the forms of instructions but wherever practicable the comment of the court in approving or condemning them. With these forms and comments before him, a careful trial lawyer after preparing his instructions in a case on trial, could quickly compare them and eliminate all doubtful and questionable ones and thereby avoid error.

While in this work many forms of approved instructions are set forth, it does not follow that every instruction is recommended as a form or precedent to be given to the jury. Many are given as precedents and contain valuable principles and comments by the court, which the skillful lawyer can readily adapt to the facts in a particular case, not only in preparing his instructions but in support of those which the court may have already given. It will be equally apparent that many of these instructions held erroneous would have been approved by a slight modification in the manner pointed out by the courts of appeal. These erroneous instructions have been set out in full with the comment of the court applicable thereto, thus enabling counsel more readily to understand in what respect they were objectionable. Much error will be prevented by comparing instructions proposed to be given, no matter where obtained, with those in the third volume held erroneous.

The approved instructions have been grouped so far as practicable under various appropriate chapter heads, with section headings. The instructions which have been held erroneous have been placed under corresponding chapter and section headings, for convenience in making comparison. The sectional contents at the head of each chapter will serve as a guide to the chapter contents. The index has been prepared with great care and it is believed will be a guide to the work.

In this connection it will not be out of place to say that attorneys should bear in mind that no instruction is proper to be given the jury unless there is evidence in the case to support

it, no matter how accurately it states well known principles of law.

In the preparation of this work and in the collection of forms and citations, it would be superfluous for the writer to say that much labor extending over a period of many years, has been expended. How well he has succeeded in meeting the requisites herein outlined, must be determined by the trial lawyer.

June, 1908. A. W. Brickwood.

PREFACE TO THE FIRST EDITION.

In offering this work to the profession, it may not be improper to state the considerations which induced its undertaking, and the objects sought to be accomplished by it. No attempt has been made to write a formal treatise on the law of instructions, or the practice of instructing juries; the design has been rather to furnish the profession in those States where instructions are required to be in writing, a work of practical utility, by collecting together, in a somewhat connected form, the decisions of the higher courts regarding the general form and essential requisites of written instructions, to be given by the court to the jury; and also, by furnishing carefully prepared general instructions upon many of the more common and intricate questions likely to arise in a general practice.

There is, perhaps, no other branch of the practice in which a young practitioner feels the need of assistance so much as in the preparation of his instructions, and requests for instructions to the jury. He generally commences the practice of his profession not only without experience, but without even a theoretical knowledge of the subject, and, in the absence of some work of this kind, without any means of acquiring such knowledge. If he refers to his usual text-books, he will find stated the general principle of law which he seeks, together with an account of its origin, history, mutations, contrary holdings and the reasons upon which it is based, with illustrations drawn from other systems of jurisprudence, while its exceptions, qualifications and limitations are treated of in another chapter; all of which may be proper enough for a learner, but it is of little assistance in the attempt to give a concise and exact statement of the whole of the law upon the point in question.

It not infrequently happens that, for greater certainty, he quotes, in his instructions, *verbatim,* from an opinion given by the higher courts in a similar case, and ultimately finds, to his surprise, that while the language used by the court was proper enough, taken in connection with the facts in the case under

consideration, it was not intended to announce a principle of universal application, and that, as applied to his own case, his instructions are erroneous, although stated "in the very language of the Supreme Court itself."

Judging from the number of new trials granted and cases reversed, on the ground of technical and formal errors in the instructions given, it would seem that the case is not much better with many of the older members of the profession. The truth is, very few lawyers are able to write an elaborate set of instructions upon intricate points of law amidst the distractions of a hotly contested trial, without committing formal errors, which cannot be detected by the judge who tries the case in the time usually allowed for that purpose. The general rule of law applicable to the case may be recalled readily enough; but its exceptions and qualifications are apt to be overlooked under such circumstances, and the practical result is, that more new trials are granted, and more cases reversed, on the ground of informality and technical errors in the instructions, than there are for the reason that either the counsel or the court really mistook the principle of the law in the case. In view of these facts it would seem that a work of this kind is almost indispensable to the young practitioner, and that to the experienced lawyer it may be of some assistance, to say the least.

While one instruction need not embody all the law of the case, each instruction should, in itself, in a clear and concise manner, correctly state the principle of law which it purports to announce, with all its necessary exceptions and limitations, without reference to the other instructions in the case. In the following pages are contained over two thousand general instructions, complying with the above requisites, which cover most of the more difficult points which are likely to arise in a general practice. It is, of course, impossible to anticipate the ever-varying facts of different cases, but it is believed that but few cases will present themselves, involving difficult propositions of law, for which the necessary general instructions can not be found in this work, or instructions embracing the principles desired to be enunciated which can, by very slight verbal alterations, be adapted to the case in point, or at least serve as a guide in drawing others adapted to the peculiar

facts of the case on trial. With any amount of aid from others there will always be abundant opportunities for the exercise of learning and skill in drawing special instructions to meet the facts of each particular case.

Upon some subjects the local statutes and decisions of the courts of the several States differ greatly, and it is manifestly impracticable to adapt all the instructions here given to these local laws and decisions; but as they are mostly of a general nature, each practitioner, by slight alterations, can make them conform to the statutes and practice of his own State. It must be constantly borne in mind that the object of this work is not so much to teach the law, as it is to assist in a correct statement of it; and it has been assumed that each lawyer knows the laws peculiar to his own State.

When an instruction embodies a familiar principle of law, it has not been deemed necessary to cite authorities in support of it, but in all other cases one or more authorities are given.

It may not be safe to assume that no mistakes have been made in attempting to state so many distinct propositions of law, and upon so great a variety of subjects as are contained in the following pages; but no pains or labor have been spared to avoid errors, and it is confidently believed that not many will be found.

F. Sackett.

Chicago, December, 1880.

PREFACE TO THE SECOND EDITION

The general favor with which the first edition of this work has been received, has induced the publishers to issue a second and revised edition, in which such errors as have been discovered are corrected, and such improvements as have suggested themselves, or been suggested by others, friends of the work, are made. It is hoped that these improvements will render the work of still greater service to the profession, and still more deserving of credit.

An eminent jurist has said that instructions should be few and those plain and simple as language can make them. (Walker, J., in *Springdale Com. Asso.* v. *Smith,* 24 Ill., 480.) But when we consider that, as a general rule, they are written by lawyers in the bustle and hurry of the trial, during the arguments of opposing counsel, often when the mind is tired, and without previous study, it is not surprising that many of them, as found in the reports, are not plain and simple as language can make them.

In this edition, where it has been possible to do so without changing the legal effect, all unnecessary and surplus words have been stricken out, at all times keeping in view the object of the instruction to convey to the minds of the jurors the correct principles of the law to be applied by them to the evidence in making up their verdict.

The form of the instructions given have been held to state the law correctly in the cases where given, and may be easily modified so as to make them applicable to other cases, bearing in mind that an instruction is never proper unless based upon the evidence in the case.

MARTIN L. NEWELL.

Minonk, Illinois, May, 1888.

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ABBREVIATIONS.

Am. Cr. Rep......American Criminal Reports.
aff'd.....Affirmed.
aff'g.....Affirming.
Com.....Commonwealth.
e.....Erroneous.
Ins.....Insurance.
p.....Page.
R. or R. R......Railroad.
Ry.....Railway.
rev'd.....Reversed.
rev'g.....Reversing.
unof.....Unofficial.

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INSTRUCTIONS TO JURIES.

PART I.

TRIALS.

CHAPTER I.

TRIALS IN GENERAL.

§ 1. **Trials—Definition of.** The examination before a competent tribunal of the facts put in issue in a cause for the purpose of determining such issue.[1] A jury trial may be defined as the presentment of the facts in the form of legal evidence, to an impartial jury, selected by the contestants. These contests may involve life, liberty or property.

A trial may be further defined as a reasonable ascertainment of facts under certain rules and regulations. It is a matter of reasoning pure and simple under our modern system of practice and in this may be seen an exhibition of the evolution in human character.

§ 2. **Methods of Trial.** In olden times, and for that matter, even in our present day civilization, the only natural thing seemed to be for contestants to settle their personal disputes by physical combat. The savage and revengeful pursuit of the wrong-doer by the one wronged, gradually gave way to the more honorable method of a formal challenge to fight. To these physical combats there came gradually to be annexed certain rules, and referees were appointed to preside. The

1—Anderson v. Pennie, 32 Cal. 267; Jenks v. State, 39 Ind. 1; Bouvier's Law Dict. 2, 749.

judges of the common pleas and even the Kings of England thought it no mean thing to grant a trial by battle and to sit as such referee or judge.

Of this nature might be instanced the trial of disputes by various superstitious methods such as the ordeal by the hot iron, by water, and so on.

§ 3. **Superstitious Trials.** These superstitious ordeals or so-called trials, merely invoked the protection of Deity from the danger impending in the event that their contention was right. In logical sequence followed the trial by the mere oath of the friends and neighbors of one of the parties, or, what amounted to the same thing, the calling upon the Deity for a witness. The matter was thus established by the oath of witnesses, the number of whom was the sacred and apostolic number, twelve. A public official acting under oath, chose from among those of the neighborhood where the matter in question arose, certain men who were indifferent between the parties and who were usually owners of property. There was little place in such a trial for the testimony of witnesses, for the jury themselves partook of this nature. A motion to direct a verdict could not be granted, as the judge could not determine upon what evidence the verdict might have been based. A new trial or appeal was only effected by an attaint or by a trial of the first jury, by a second jury on a charge of perjury or other moral or legal misconduct.

§ 4. **Place of Trial.** The place of trial is held to be immaterial, as the validity of the trial does not depend on the place; it may be wherever convenience or necessity requires. The courtroom where the court usually holds its session is not sacramental and another room or office may be used.[2]

In Texas it has been held that all proceedings must be held in the courthouse at the County seat, as provided by law, and that a defendant could not be required to go to another place for trial.[3]

§ 5. **Personal Knowledge of Jurors.** The great factor which formerly controlled the conduct of a jury, i. e., that the jury possessed personal knowledge outside of the evidence upon which they acted remains true, to this day, although not to the same extent or in the same sense.

2—Smith v. Jones, 23 La. 43; Calvert v. State, 91 Ind. 473. Mohon v. Harkreader, 18 Kan. 383; Reed v. State, 147 Ind. 41; 3—Adams v. State, 19 Tex. App. 12.

In the great store of common knowledge, in intuition, in the moral and mental faculties, in the physical senses, and in other things, the jury find evidence to corroborate or contradict the evidence produced by witnesses, concerning the controversy.

Of the controversy itself the jury should know nothing, or if they do know, by hearsay or otherwise, such knowledge should be such as not to affect their ability to be fair and impartial.

§ 6. **(Same subject continued.)** Jurors may, and in fact should, use their own personal knowledge and experience in drawing conclusions from the evidence in the case, but it will be noticed that particular stress should always be placed upon their ability to base their conclusions upon such evidence.[4] The personal knowledge of individual jurors concerning matters which might be properly part of the evidence, as for instance, the reputation or character of the witness who testified, should not be taken into consideration in making up a verdict.[5]

§ 7. **Jurors Must Not Be Witnesses.** It can never be allowed that a juror should aid in finding a verdict, or even sit in a case when his attitude of mind is rather that of a witness than of a juror. Of course, a state of affairs may arise by accident, as when on the *voir dire* examination, a collateral fact not manifestly connected with the issue, becomes so later in the case. The practice in such an event is to call the juror to the stand, receive his testimony and then to have him return to the jury.[6] In the event, however, that his testimony is of an important nature, it may be necessary to discharge the juror and to begin again, for no good could result from continuing the case where a new trial would be granted almost as a matter of course.

If a juror discloses or speaks of his testimony to all or any of his fellow jurors, whether he testifies in court on that point or not and whether it be done in the jury room during delib-

4—McGarrahan v. N. Y. N. H. & H. Ry., 171 Mass. 211, 50 N. E. 610.

5—Schmidt v. N. Y. N. Mut. Fire Ins. Co., 67 Mass. (1 Gray) 529.

6—A juror may be a competent witness in all civil or criminal cases at the instance of either party. Morse v. Morse, 11 Barb. 510; Howser v. Commonwealth, 51 Pa. 332; State v. Cavanaugh, 98 Ia. 688, 68 N. W. 452; People v. Dohreng, 59 N. Y. 374; Plankroad v. Thomas, 20 Pa. 91.

eration or elsewhere, it is a clear violation of the hearsay rule and sufficient to vitiate the verdict.

§ 8. **The Jury System.** It seems advisable, before taking up this subject, to make some general, yet necessarily brief, observation on the formation of a trial jury. The right of trial by jury originated in the demand of the common people to have their wrongs righted and justice done them by an impartial jury of their peers. One of the chief qualifications of a juror originally was that he should have a personal knowledge of the matter at issue, and an acquaintance with the persons to be tried so that he might be better able to judge. But singularly strange yet true, this very thing has now become in modern practice, the least desirable in the procurement of a legally qualified and unprejudiced jury. And, if opinion has been formed, which requires evidence to remove, it becomes a disqualification.

§ 9. **(Same subject continued.)** While this has led to criticism of the entire jury system, no strictures thereon will ever lead to its abolition and a return to the arbitrary decision of any judge, no matter how famed his integrity and ability, whereby the litigants be again at the mercy of one removed from common sympathy with his fellow men by reason of his station, power, or prominence.

§ 10. **Constitutional Right to Trial by Jury.** While this subject would not seem to embrace any matters connected with the procurement of the jurors prior to their presentation in court for selection or challenge by the parties, yet it will be readily seen that in order properly to avail oneself of the right to challenge the array, a comprehensive study of the method and manner of securing the panel is absolutely necessary.

The right of trial by jury in these United States has behind it not only the force of the right as found in the practice of the common law in all its details, but is also guaranteed under the constitution of the United States and the constitutions of the several states. It applies in all cases at law in the same measure as it existed prior to the adoption of the constitution excepting where it has been subsequently modified.

§ 11. **Same Subject as to Federal Courts.** The federal constitution guarantees the right to a jury trial only in the courts of the United States.[7] The selection of juries in the Federal courts is to a large extent similar in practice to that of the

7—Ex parte Brown, 140 Fed. 461.

state in which the court sits, but in no sense are the Federal courts bound by the statutes and practices of the State court.[8]

The constitutional provision that the right of trial by jury shall remain inviolate guarantees such right only in those cases where at the time of the adoption of the constitution, the law gave that right, and not in those cases where the right and the remedy are thereafter created by statute nor where the cause was already the subject of equitable jurisdiction.[9]

§ 12. Cases to Which Right to Trial by Jury Does Not Extend. The constitutional right to trial by jury does not extend to proceedings in equity either under the Federal or State constitutions.[10] It is held however, that the power of the legislature to provide for a trial without jury in cases in which before the adoption of the constitution it was not enjoyed, is unlimited.[11] It cannot be claimed as a matter of right in equity cases, in *quo warranto,* in probate proceedings, in cases of contempt,[12] or in summary proceedings unknown to the common law,[13] in proceedings *in rem,* or for the assessment for expenditures for public improvements, unless specifically conferred by statute,[14] but see contra.[15]

§ 13. Tests of Right to Jury Trial. Where a crime involves sentence to hard labor, the right to trial by jury is inviolate, but not in mere petty offenses punishable by summary proceedings before municipal courts.[16]

The criterion by which the right to a jury trial is determined is the character of the action, that is, the right sought, and not the distinction between legal and equitable properties. This does not mean that it depends on the prayer for relief, but on whether the contents of the pleadings call for a judgment at law or a decree in chancery.[17]

8—Radford v. U. S., 129 Fed. 49.

9—Hathorne v. Panama Park Co., 32 So. 812; Queenan v. Territory, 11 Okla. 261, 71 P. 218, 190 U. S. 548, 23 S. Ct. 762, 61 L. R. A. 324.

10—Keith v. Henkleman, 173 Ill. 137, 50 N. E. 692; Maynard v. Richards, 166 Ill. 466, 46 N. E. 1138.

11—Spring Valley v. Spring Valley Coal Co., 173 Ill. 497, 50 N. E. 1067; Drady v. Dist. Ct., 126 Ia. 345, 102 N. W. 115.

12—Holnbach v. Wilson, 159 Ill. 151, 42 N. E. 169.

13—People v. Hill, 163 Ill. 195, 46 N. E. 796, 36 L. R. A. 634.

14—Juvinall v. Jamesburg Dist., 204 Ill. 106, 68 N. E. 440.

15—Ingram v. Maine Water Co., 98 Me. 566, 57 A. 893.

16—Jamieson v. Wimbish, 130 Fed. 351; Bray v. State, 140 Ala. 172, 37 So. 250.

17—New Harmony Lodge v. R.

In civil actions at law, the court has no authority to try a case where a jury is demanded[18] unless the relief demanded is peculiar to equity practice.[19]

§ 14. Usual Jury Trials. A trial jury at common law and under most of the constitutions of the various states consists of twelve fair, competent, impartial men legally drawn, impaneled and sworn to render a unanimous verdict upon the evidence given at the trial in the issues of the controversy under the superintendence of the court with power to advise them as to the facts, and to instruct them as to the law and to set aside their verdict when contrary to the law and evidence, excepting in criminal cases.[20]

§ 15. Waiver of Jury Trial. It is held to be a sufficient compliance with this constitutional guarantee that a jury trial may be had upon appeal.[21] It seems that this constitutional right cannot be waived in criminal cases on a trial for a felony[22] although it may be in civil cases.[23] A commitment to a reform school for children without a jury trial is held to be constitutional and justified on the ground that they are not tried for any offense, but are merely taken proper care of.[24] So important is this right that an action of mandamus can be had to compel the court to give a trial by jury.[25] It is thus

Co., 100 Mo. App. 407, 74 S. W. 5; Harrigan v. Gilchrist, 99 N. W. 909.

18—Hanson v. Carblom, 100 N. W. 1084, N. Dak.

19—New Harmony Lodge v. R. Co., 100 Mo. App. 407, 74 S. W. 5.

20—Archer v. Board of Levee Insp., 128 Fed. 125; State v. Mott, 29 Mont. 292, 74 Pac. 728.

21—Schively v. Lankford, 174 Mo. 535, 74 S. W. 835; Carvin v. Hower & Higbee, 5 Ohio C. C. 70.

22—Queenan v. Territory, 71 Pac. 218, 11 Okla. 261, 23 S. Ct. 762, 61 L. R. A. 324; Hill v. People, 16 Mich. 351.

23—Denee v. McCoy, 69 So. W. 858. "Waiver of a jury at the first trial in ejectment will not preclude either party from demanding a jury at the second trial, after the judgment at the first trial had been set aside, under Code Civil Proc., sec. 630." Schumacher v. Crane-Churchill Co., 92 N. W. 609.

24—Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198; State v. Packenham, 40 Wash. 403, 82 P. 597.

25—See 2nd Current Law, page 635. It is well settled that in civil actions trial by jury is not necessary. Walker v. Sauvinet, 92 U. S. 90; Higgins v. Farmers' Ins. Co., 60 Ia. 50. Indictment by grand jury held not necessary. Hurtado v. California, 110 U. S. 516.

seen that the right of trial by jury under the United States and the State constitutions may be expressly waived, either by a writing filed in court, or orally or impliedly in all civil cases, and in all criminal cases involving offenses less than a felony or of a petty nature, but being a constitutional right as aforesaid, a waiver cannot be presumed. In the Federal court and in some state courts an express waiver is necessary, but a stipulation for instance, for the finding of facts, has been construed as sufficient.

CHAPTER II.

IMPANELING THE JURY.

§ 16. Drawing and Selecting a Venire. A party has undoubtedly a clear constitutional right to have presented to him a venire properly selected according to the requirements of the statutes and laws of his state, and may rightfully object to a jury otherwise drawn.

The various statutes contain very full accounts of the methods and means by which jurors are selected and drawn and should of course be consulted. In a general way, however, it is universally held that slight irregularities, informalities, and failure of strict compliance with these statutory requirements by the summoning officer or jury commissioners or election boards whose duty it may be to select and furnish the list of jurors, will not constitute a valid ground of objection or challenge.

§ 17. Substantial Compliance Sufficient. A substantial compliance is demanded, but deviations from the positive provisions made to secure and guard the drawing of a fair, impartial jury cannot, however, be treated as harmless.[1] Statutory provisions as to selecting jurors are held directory and should be liberally construed.[2]

Irregularities such as drawing a jury at a time and place different from that prescribed by law do not render a jury so drawn illegal.[3] Irregularities also in the method of selecting a jury list are deemed immaterial unless it appears probable that the party challenging was prejudiced thereby.[4]

It has been held that a person not eligible as a jury commissioner, but who qualifies and acts as such is a *de facto* officer, and his acts in selecting the jury list are those of a *de facto* officer filling a *de jure* office, and do not constitute a valid ground for a plea in abatement.[5]

§ 18. (Same subject continued.) A failure of an election board or other officer, having the duty of returning list of names, to return any list of names at all, or to return them at the proper time, or the obtaining of the names in an irregular manner so long as they are procured from the proper source untampered with and through the proper channels, will not be a good ground of objection or challenge. A substantial compliance is considered sufficient, although a panel may be quashed where the jurors are not drawn from the list or class prescribed by statute. If the statute prescribes a drawing from certain taxpayers or qualified electors or persons having a certain length of residence within the jurisdiction, it must be strictly followed. Where a jury commissioner is required to select the names in the presence of parties or their attorneys, and the list is selected in their absence, it may be set aside.[6]

§ 19. Right to a List of the Jurors. It is also undoubtedly the right of a party to have a reasonable opportunity afforded

1—Hewitt v. Saginaw Circuit Court Judge, 71 Mich. 287, 39 N. W. 56; State v. Carney, 20 Iowa 82.

2—People v. Richards, 82 Pac. 691, 1 Cal. App. 566.

3—State v. Teachey, 138 N. C. 587, 50 S. E. 232.

4—Ullman v. State, 124 Wis. 602, 103 N. W. 6; Wilhelm v. People, 72 Ill. 468; People v. Madison Co., 125 Ill. 334.

5—State v. Sutherlin, 165 Ind. 339, 75 N. E. 642; Wright v. State, 124 Ga. 84, 52 S. E. 146.

6—Industrial & Gen'l Trust v. Tod, 34 Civ. Proc. R. 287, 93 N. Y. App. 725.

by law, in which he may learn who are called to serve on the venire. Usually at some stated period prior to the term of court at which the panel is returned, a complete and full list of all persons intended to be summoned, whether actually so summoned or not, and whether qualified or not, giving the residence, and, in some places, also the occupation of the jurors, may be secured from the clerk of the court. It is sometimes published in the court calendars or newspapers[7] or mailed to or served on the parties whose cases are pending for trial.[8] More especially is this true in criminal cases. In no case, however, does there seem to be any obligation to furnish a list in the absence of express statutory requirements.

The statutory provisions requiring timely notice confer important and substantial rights which should not be impaired.

This right to a list of jurors when given is peculiarly personal in its nature, and may be waived by a failure to claim it in proper time, or by a failure to object to a trial where the list has not been furnished to or served on the party.

For the practice in this matter, reference should be had to the statutes of the state in which the jury is drawn. In the United States Federal Courts the practice is controlled by congressional legislation, which empowers the several United States Courts to adopt the practice of the state court in which they sit, or to make at will all necessary rules and orders in conformity therewith. This, however, seems not to have had any bearing upon the number of jurors which may be summoned, as this rests entirely with the court itself in the exercise of its discretion.

§ 20. Right to have Jury Drawn from the Vicinage. The equalization of jury duty is fixed by proportioning the number of jurors to be summoned according to the population or the number of electors within the several subdivisions of the particular county or district in which the court sits.

The common law required a certain number to come from the very hundred or vicinage where the crime was alleged to have been committed, or the action to have arisen, and this is held to be a constitutional right in the various states.[9] The state cannot ask a change of venue on the ground that no jury

7—State v. Winters, 33 So. 47, 109 La. 3.

8—State v. Bordelan, 113 La. 690, 37 So. 603.

9—State v. Cutshall, 110 N. C. 538, 15 S. E. 261; Buckrice v. People, 110 Ill. 29.

is obtainable in the county where the cause is pending for this reason, that the jury must be of the vicinage as at common law.[10] It seems however to have been held in one court that a statute providing for a change of venue by the state on application of its attorney is not unconstitutional as violating the right of trial by jury from the vicinage.[11] And it has been held, where the court deemed it impossible to secure an impartial jury from the county where the case was to be tried, that a jury was properly drawn from an adjoining county.[12]

The Supreme Court of Rhode Island has construed the right of trial of the vicinage not necessarily to mean of the county where the cause originated, and that it is not violated by a change of venue for the purpose of securing an impartial trial or to avoid local prejudice.[13]

The right to trial by jury drawn from the vicinage may be of a particular district however.[14] It is held in Alabama that the acts of 1884, p. 726, creating divisions of the Circuit Court of the county do not require that jurors live in the division where the court sits; hence a qualified juror of the county may serve in any division.[15]

§ 21. **Challenge to the Array.** A challenge to the array is a proper objection to the mode of summoning jurors and not to the qualifications possessed by them; it must affect the whole panel alike and be made in time and before entering upon the formation of a jury if the facts are then known. Where the defect complained of appears clearly in the writ itself, or otherwise in the records of the court, there would exist no reason to support this challenge by proof, as it would otherwise be incumbent upon the party to do so by his own affidavit or that of some credible person having a knowledge of the same.

At common law a challenge to the array was an objection to all the jurors returned collectively and was founded on some fault, misconduct or bias of the officers summoning the venire, or the clerk by whom the panel is arrayed. Any material departure from the law in selecting, listing, drawing or sum-

10—People v. Powell, 87 Cal. 348, 25 Pac. 481.

11—Barry v. Truax, 13 N. D. 131, 99 N. W. 769, 65 L. R. A. 762.

12—Mosely v. Com., 27 Ky. L. 214, 84 S. W. 748.

13—Taylor v. Gardiner, 11 R. I. 182.

14—United States v. Ayres, 46 Fed. 651.

15—Nordan v. State, 143 Ala. 13, 39 So. 406.

moning jurors constitutes good ground for a challenge generally.

§ 22. **Grounds for Challenge to the Array.** A selection instead of a drawing of the jurors by lot, as provided by law; a selection by disqualified judge and not by the proper officer; or any palpable disregard of the statutory methods required in the selection or drawing of jurors, are all held to be good grounds for challenge. So also is the relationship of the summoning officer to one of the parties, or if the summoning officer is attorney to one of the parties in the action, it is a good ground of challenge.

In general, any partiality or corruption of the summoning officer, such as the wilful summoning of persons whom he knows to be prejudiced, with a view to securing a favorable verdict; the intentional omission to summon certain jurors for a corrupt reason; in fact any unfairness, fraud, bias or corruption whatsoever on the part of the officer, by which prejudice might result to one of the parties, would be good grounds for such challenge.

To avoid packing of juries, the common law method of selection was changed by the preparation by the proper officers or jury commissioners of a list of persons to be summoned by the summoning officer instead of allowing this selection to be at the sole discretion of such summoning officer, so that much of what has been said along this line would not now be applicable in many jurisdictions.

§ 23. **(Same subject continued.)** A motion to quash a panel must be made in proper time and comes too late after a jury has been selected and accepted,[16] and a challenge to a panel can only be founded on a material departure from the forms prescribed by law in respect to the drawing and returning of the jury.[17] It may be taken by either party, and on trial thereof, that the officers whether judicial or ministerial, whose irregularity is complained of, as well as any other person, may be examined to prove or disprove the facts alleged as a ground of challenge to the panel.[18] Where the law required twenty-four jurors to be summoned, and only fifteen were summoned by the clerk, it was considered a good ground for challenge.[19]

16—Dunn v. State, 143 Ala. 67, 39 So. 147; Ullman v. State, 124 Wis. 602, 103 N. W. 6.

17—Baker v. Steamboat Milwaukee, 14 Iowa 214.

18—Code of Iowa.

19—Baker v. Steamboat, 14 Iowa 214.

It is interesting in this connection to note that in a case where all the jurors of the regular panel but one had been excused, it was held not to be erroneous to call in eleven talesmen to try the case with the one juryman of the regular panel.[20]

At common law a challenge to the array was required to be made in writing, stating specifically the grounds relied on; and an issue of law or fact was then formed in respect thereto, which was tried by the court, if one of law, or by triers appointed by the court, if one of fact.[21]

§ 24. Right of the Court to Discharge Jurors at Its Own Instance. It would seem to be the far better practice to remove a juror in the first instance from the duty of passing upon a case upon which he has any opinion one way or the other than to attempt finally to remove the prejudice or bias born of such a preconceived opinion. The rules of credibility and of preponderance of evidence may be given ever so clearly and precisely by the court but with questionable effect upon a jury having unfair minds or preconceptions of the issues involved.

There is no doubt that instructions may be and are purposely framed to cure all possible prejudices formed in a juror's mind, yet no dependence can safely be placed upon such procedure and the necessity would seem better to have been avoided.

From these observations we may see that the chief cornerstone in a well selected jury is to secure men mentally qualified to divide the truth from error, void of offense or prejudice to either party, sensible of their duties and responsibilities, true to their oath and guided only by the clear light of reason, and deciding upon the evidence alone under the instructions of the court.

It is not only the right and privilege of the parties to have an unprejudiced jury to try the issues joined, but it is also the duty of the court to aid in securing such jury, and the court should lend itself to the pursuit of this object by excusing of its own motion any juror legally or morally disqualified or incompetent.

In the exercise of sound judgment and discretion, and before either party is tendered the panel, the trial judge should excuse

20—Emerick v. Sloan, 18 Iowa 139.

21—Ullman v. State, 124 Wis. 602, 103 N. W. 6.

all jurors for any good and sufficient cause, in whatever manner it may appear or come to the attention of the court.

A lack of intelligence, unfitting the juror to sit in judgment; ignorance of the English language, so as not to understand what takes place; being under the influence of intoxicating liquors; not being a citizen or resident within the jurisdiction of the court or the limit prescribed by statute; relationship to the parties to the case on trial or members of their families, would all constitute good reasons for excusing the juror. So also, would be any mental difficulty, such as conscientious scruples against the infliction of punishment or of the death penalty in particular, or against the bringing of any action at law whatever.

§ 25. **(Same subject continued.)** In the exercise of its discretion it seems that a court may at any time discharge a juror who is inadvertently sworn and who cannot render a legal verdict in the case.[22] For a cause existing before as well as after a juror is sworn, the court may discharge a juror discovered to be incompetent.[23] A court may on its own motion excuse any juror competent in all other respects, but who from disease, domestic difficulties, deafness or other similar causes is unable physically to perform his duties as a juror.[24]

It is held that the court in its discretion may discharge a juror, even when accepted and sworn, at any time before the evidence has been introduced.[25]

Contrary to the consent of one party, and at the instance of the other, a court may discharge a juror for good legal grounds properly sustained even after the jury has been accepted;[26] but a court has no power to excuse a juror without the consent of the defendant where the juror has been sworn and impaneled in a felony case;[27] it has been held, however, in a certain case that a juror was properly excused by a court for deafness even without consent of the defendant.[28]

A juror should be immediately discharged at any stage of the trial, when the court learns that he is so biased or prejudiced as not to be impartial, by reason of facts existing

22—Thomas v. Leonard, 5 Ill. 556.

23—People v. Damar, 13 N. Y. 351.

24—Montague v. Com., 10 Grat. 767.

25—People v. Beckwith, 103 N. Y. 360, 8 N. E. 662.

26—Greer v. Merrill, 3 Hill. 262.

27—Sterling v. State, 15 Tex. App. 249.

28—Jesse v. State, 20 Ga. 156.

when the jury was impaneled, but unknown to the court, or occurring afterward.[29]

There is no vested right in any particular juror, and a juror may be rejected by the court without question, no matter what the parties may want, it being alone sufficient that they have an impartial jury.[30]

§ 26. **Discretion to Court as to Excusing Jurors.** For reasons of public policy, and because business men are desirable as jurors, the courts are not inclined to accept business excuses as sufficient.

The accused in a criminal case cannot complain of the ruling of the trial judge in excusing jurors in the exercise of his discretion, it has been held, where there is a sufficient number left, or where no prejudice results therefrom.[31] Jurors may be discharged by the court who have served in another case at the same term where their verdict was so entirely against the evidence as to be evident that they were unfit to serve on any subsequent case of importance.[32] When the prosecuting attorney, before exercising his peremptory challenge, asked the court to excuse a certain juror for the reason that the state wished to use him as a witness, it was held to be within the discretion of the court to excuse the juror, and the fact that subsequently he was not introduced as a witness was held to be no evidence in itself of bad faith.[33]

Conflicting duties and certain business obligations constitute good grounds of excuse, such as a juror having a member of his family ill at home and his presence being required there; or being a farmer and having his live stock left without care; being a public officer and having duties to attend to and the public interests liable to suffer; being a party to another case in court at the same time; or having a wedding of a member of the family to be celebrated immediately. Such excuses founded on personal reasons are matters of which the juror seemingly alone might avail himself, yet, if these matters were not disclosed, except by examination on the *voir dire*, they might then be taken advantage of by a challenge

29—Sorenson v. Oregon P. Co., 82 Pac. 10, 47 Ore. 24.

30—Gr. Rapids Booming Co. v. Jarvis, 30 Mich. 308.

31—Nordan v. State, 143 Ala. 13, 39 So. 406, Under Code 1892; Brown v. State, Miss. 38 So. 316; State v. Voorhies, 38 So. 964, 115 La. 200.

32—People v. Murray, 85 Cal. 350, 24 Pac. 666.

33—Barnes v. Com., 70 S. W. 827, 24 Ky. Law Rep. 1143.

for cause by inquiring further if the existence of these facts so disclosed would keep the juror from giving undivided attention to the trial of the case at hand.

§ 27. Eligibility not Confined to White Persons. Eligibility to jury duty cannot be confined to white persons; colored citizens are of course qualified for jury service.[34] A person of one race cannot demand as a right that juries to try causes in which they are parties shall be composed in whole or in part of their own race.[35] So also it will not be a ground for challenge that the list of jurors contained only white men on the trial of a negro unless fraud or corruption is shown in selecting the jury.[36]

§ 28. Form and Manner of Stating the Challenge. The trial court has some discretion as to how specifically the grounds of challenge should be stated. The statement should be sufficiently full and definite to inform the trial court and the adverse party reasonably of the precise departure from the legal requirements relied on.[37] Even where, as in Wisconsin, the statutes do not provide for a challenge or other objection to the panel, such an objection may be raised and the form in which it is raised is not considered important. It may be in the set phrase of a challenge to the array, or in the form of a motion to quash the returns thereof, and is sufficient if stated definitely and taken down by a stenographer.[38]

A motion to quash a venire on the ground that it was not drawn and summoned according to law states a mere conclusion and is held insufficient.[39]

A challenge to the array is an objection to all the jurors collectively, and not the proper method of questioning the qualifications of individual jurors. Such an objection should be raised by a challenge to the polls.[40]

34—Neal v. Delaware, 103 U. S. 370.

35—Williams v. State, 44 Tex. 34.

36—Hicks v. Com., 3 Ky. Law Rep. 87; Smith v. Com., 17 Ky. Law 1162, 33 S. W. 825; Williams v. State, *supra;* Cavitt v. State, 15 Tex. App. 190; State v. Sloan, 97 N. C. 499, 2 S. E. 666.

37—Ullman v. State, 124 Wis. 602, 103 N. W. 6.

38—Id.

39—Peel v. State, 144 Ala. 125, 39 So. 251; Starr v. State (Tex. Cr. App.), 13 Tex. Ct. Rep. 104, 86 S. W. 1023; State v. McNay, 100 Md. 622, 60 Atl. 273.

40—People v. Richards, 1 Cal. App. 566, 82 Pac. 691; Bryan v. State, 124 Ga. 79, 52 S. E. 298; Rawlins v. State, 124 Ga. 31, 52 S. E. 1.

§ 29. Common Law Challenges to the Polls. We now arrive at that stage of the proceedings where the actual formation of the trial jury is begun, when the venire summoned have presented themselves, and where the parties have had an opportunity to challenge the array.

It then remains for the parties to challenge the jurors individually as they may be called to sit upon the case. Challenges to the polls were of two kinds at common law, *principal challenges* and *challenge to the favor*. A principal challenge was one triable by the court itself on the testimony of the juror to the exclusion of all other evidence, and if found true, the juror was adjudged incompetent *per se*. It was grounded upon such manifest presumption of partiality that if the fact alleged was proved, disqualification followed as an irrebuttable legal conclusion. The truth and existence of certain facts were alone to be determined in this case.

On the other hand, upon a challenge to the favor, disqualification arose as a question of fact to be determined by triers selected or appointed for the purpose, and the evidence adduced in support of the challenge led to no presumption not subject to rebuttal. In fact it was a challenge upon suspicion only and for the purpose of determining whether or not the juror was indifferent. It involved, also, a question of fact, but this did not necessarily disqualify a juror, except as it might do so according to the state of mind of the juror produced by these facts.

A ground of principal challenge at common law is generally an absolute disqualification following as a necessary legal conclusion upon mere proof of the fact alleged.[41]

Under our modern practice there still remains unabrogated the underlying reasons for the distinction between these two challenges for cause although they are not separately designated by their common law terms and although both are tried and passed upon by the court.

§ 30. Right of Challenge for Cause. The right to challenge for cause is a common law right which cannot be taken away except by statute, if in fact at all; and wherever there is a common law jury, that is, a jury of twelve fair, impartial, competent men, qualified to try the issue, there must necessarily follow the right of selection or rejection for cause, or

41—Coughlin v. People, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57.

else these fundamental rights are ignored, abridged or destroyed.[42]

The grounds of challenge for cause have been subdivided by various authors to little or no practical advantage, the main idea being to secure a fair, impartial jury, and then to maintain the same under the instruction of the court until the final submission of the case to them. Any proper question seeking to elicit a juror's frame of mind respecting the parties or the action is allowable, but where the answer will have no disqualifying effect in one way or the other, it may properly be refused. Challenges for cause are of course unlimited in number, but the grounds therefor must be stated.[43]

§ 31. Latitude of Examination on Voir Dire. The scope of the examination is wide, varying with the nature of the case on trial, and questions relating directly not only to facts which in themselves disqualify, but also to facts which in connection with others have a tendency to affect the mind and bias, may be asked.

Considerable latitude is allowed in the examination of persons called to act as jurors, not only to facilitate the discovery of grounds for challenge for cause, but to enable the parties to discover any peculiarity of conduct, association, character or opinion, or any predilection of the person under examination or other circumstances which in the opinion of the examiner might influence the person as a juror and affect his verdict.[44]

A right to an impartial jury being fundamental, there must be a right reasonably to examine a person called as a juror to ascertain whether or not he is impartial. Questions may also be asked within limits fixed by considerations of ordinary propriety and pertinency for the purpose of searching for facts upon which the right of peremptory challenge may be prudently and intelligently exercised.[45] It has been held, however, to the contrary that questions the sole object of which was to aid in the exercise of peremptory challenges were improper.[46]

42—Knudinger v. Saginaw, 59 Mich. 355, 26 N. W. 634; Barnett v. Long, 3 H. L. Cas. 395-415.

43—Davis v. Anchor Mut. Ins. Co., 96 Iowa 70, 64 N. W. 687.

44—State v. Dooley, 89 Iowa 584, 57 N. W. 414.

45—State v. Dooley, *supra;* State v. Foster, 91 Iowa 164, 59 N. W. 8; Vandalia v. Seibert, 47 Ill. App. 477.

46—Dimmach v. Wheeling Traction Co., 52 S. E. 101, 58 W. Va. 226.

§ 32. **(Same subject continued.)** Questions touching scruples of the jurors, asked for the purpose of disclosing facts affecting impartiality, may in proper cases refer to matters of religion or of race, as for instance, an inquiry if the juror was biased against a particular religious denomination or sect, or if he would take the word of a Chinaman as fully as the word of any other person.[47] But a juror cannot be asked whether he would believe a certain witness under oath.[48] It is held improper to ask if the juror would give the testimony of the defendant weight if reasonable and uncontradicted and on some material point, although he might be asked if he would give all the evidence fair and impartial consideration and such weight as it is entitled to.[49] It is held competent to ask a juror, in order to test his bias, which party he would favor if the evidence were equally balanced.[50] In Illinois, however, this question has been held improper.[51]

A juror may be asked as to his knowledge of the facts, or if he has formed any opinion about the case, but not as to his opinion on an assumed state of facts.[52] A question upon preliminary examination of a juror should not be permitted where it calls for a decision of a question of law and does not inform the juror as to the rule of law which governs in the case supposed; nor should a question be permitted which calls for a pre-judgment of the case and a statement as to which party he would find for in a supposed state of the evidence, thus possibly entrapping the juror into an answer which may disqualify him.[53]

§ 33. **Questions on The Voir Dire,—Importance of Examination.** The jury receives the law from the court, and for this reason counsel should not be permitted to question the juror concerning points of law, or in fact to read to him extracts of law or decisions of the Supreme Court.[54] A question

47—People v. Gar Soi, 57 Cal. 102.

48—Fugate v. State, 37 So. 557, 85 Miss. 94, 107 Am. St. Rep. 268.

49—People v. Warner, 147 Calif. 546, 82 Pac. 196.

50—Otsego Lake v. Kersten, 72 Mich. 1, 40 N. W. 26; Monogham v. Agri. Fire Ins. Co., 53 Mich. 238, 18 N. W. 797.

51—Chicago & Alton Ry. Co. v. Adler, 56 Ill. 344; Chicago & Alton v. Fisher, 38 Ill. App. 33; Fish v. Glass, 54 Ill. App. 655.

52—Fish v. Glass, *supra;* Woolen v. Wire, 110 Ind. 251, 11 N. E. 239.

53—Chicago & Alton R. Co. v. Adler, *supra;* Chicago & Alton R. Co. v. Fisher, *supra.*

54—City of Chicago v. McGib-

should not be asked which calls upon the juror to anticipate the instructions which will be given the jury by the court, as, for instance, asking whether the juror knows "that a defendant in a criminal case is entitled to the presumption of innocence;"[55] nor should a question which purposes the disgrace of a juror be permitted.

A juror is sworn to answer such questions touching his qualifications to sit as a juror in the case as may be put to him, and for the purpose of ascertaining if a juror is of sound judgment and well informed as required by statute, it would seem that questions might be asked concerning the juror's general opinion of his duties. In Illinois, however, it has been held otherwise.[56]

It becomes especially important that a party should make a full inquiry on the *voir dire*, for the reason that grounds for challenge which might be learned by examination, had the question been asked of a juror, are deemed to have been waived.[57] If a juror is not examined as to his qualifications and competency, all objections on those grounds are waived, although the fact of incompetency did not become known until after the trial.[58] Defendants in criminal cases should upon their *voir dire* examination of jurors endeavor to discover the grounds for challenge for cause, and generally after verdict rely upon their ignorance as a ground for reversal.[59] Where the matter is not inquired into on the *voir dire* examination, and no objection is made until after the trial, such objection is deemed waived.[60] It is not a good ground for a new trial that counsel learns of new facts concerning a juror after the trial, which would have been of no use to him on a challenge for cause, but which would have caused him only to have exercised a peremptory challenge.[61]

An objection to the competency of a juror should always be made when he is sworn, but if it is not then known, it

bons, 78 Ill. 347; Philpot v. Taylor, 75 Ill. 309.

55—Ryan v. State, 115 Wis. 488, 92 N. W. 271.

56—Penn. Co. v. Rudd, 100 Ill. 603.

57—Turley v. State, 104 N. W. 934 (Neb.).

58—State v. Carpenter, 98 N. W. 775.

59—McNish v. State, 36 So. 176; Carter v. State, 76 S. W. 437; State v. Greenland, 125 Ia. 141, 100 N. W. 341; Rhodes v. State, 50 S. E. 361, 122 Ga. 568.

60—Turley v. State, *supra*.

61—Hern v. So. Pac. Co., 29 Utah 127, 81 Pac. 902.

may be interposed after the verdict.[62] The failure to raise an objection on a known ground of disqualification before or during the trial is waived if it is raised only after the verdict.[63]

Any judgment is erroneous that is rendered upon a verdict found by a jury of which any member is disqualified. It is not regarded as a nullity and as void, although it is clearly erroneous and reversible on appeal.[64]

§ 34. Acceptance of Juror Is a Waiver of Objections, When. It is a rule that if a party accepts a jury knowing that one member is incompetent, he thereby waives the defect.[65] Nothing is waived, however, where a juror who conceals his bias is accepted. The parties may safely rely on his sworn statements on his *voir dire* examination.[66] Misconduct manifestly prejudicial is shown where a venire-man falsely states on his *voir dire* that he has not heard the matter discussed, does not know anything about it and is not acquainted with any of the witnesses.[67] The aggrieved party is entitled to a new trial as of right, where a juror swears falsely and conceals his bias on his *voir dire* examination.[68] This, however, does not relieve the party from the duty of making a full examination of the juror before accepting him.

Where a party accepts a juror without examination, all objections on the ground of want of qualifications, discovered afterward, are considered waived, unless the opposing party is guilty of concealment or fraud in the matter.[69]

§ 35. Evidence in Support of a Challenge. Both parties have the right to interrogate each proposed juror on his oath, touching his qualifications, and if a challenge is not allowed on the facts disclosed by the juror's examination, other evidence than the testimony of the persons challenged may be heard, and the court is required to determine both the law

62—State v. Groome, 10 Iowa 308.

63—Queenan v. Territory, 11 Okla. 261, 61 L. R. A. 324, 71 Pac. 218.

64—Foreman v. Hunter, 59 Ia. 550, 13 N. W. 659.

65—State v. Groome, 10 Iowa 308.

66—Heasley v. Nichols, 38 Wash. 485, 80 Pac. 769.

67—State v. Lauth, 46 Ore. 342, 80 Pac. 660.

68—Heasley v. Nichols, 38 Wash. 485, 80 Pac. 769.

69—Watts v. Ruth, 30 Ohio 23; State v. Hinckle, 27 Kans. 308; Croy v. State, 32 Ind. 384; State v. Powers, 10 Oreg. 145; Manion v. Flynn, 39 Conn. 330; Viele v. Funk, 17 Iowa 365; Light v. C. M. & St. P. R. Co., 61 N. W. 380, 93 Iowa 83.

and the facts involved.[70] A court may receive affidavits of the character of a juror who has sworn falsely on his examination and whose credit and veracity is attacked;[71] but unless there is a sufficient and positive showing in the affidavit, the verdict will not be set aside on the ground of the bias of a juror.[72]

A challenge for cause must state the ground on which it is based; otherwise it is too indefinite and should be overruled;[73] and not only so, but it must be supported by a good and sufficient ground;[74] and it must be of such a nature that if proven, it would be sufficient to sustain the challenge.[75]

In all challenges the court is the sole judge of the law and the facts,[76] and to any error of the court in this respect an exception would lie.

§ 36. When an Erroneous Ruling on a Challenge is Prejudicial. The court should allow a wide latitude upon the *voir dire* examination of a juror, and should be disposed to accept the testimony of witnesses called in support of the challenge, and especially is this true where a party has exhausted his peremptory challenges, and a strict ruling of the court would foist upon him a biased or prejudiced juror.[77] It is held however, that a ruling on a challenge for cause, even if erroneous is without prejudice where the party has not exhausted his peremptory challenges.[78]

Overruling a challenge for cause, and thus compelling a party to resort to a peremptory challenge, does not prejudice him where, when the jury is finally accepted, he still has peremptory challenges not used. If the court by overruling a challenge for cause, should prejudice the rights of the party by compelling him to exhaust a final peremptory challenge on persons liable to challenge for cause, such ruling would be error.[79] It is prejudicial error to overrule challenges to dis-

70—State v. Brownlee, 84 Iowa 473, 51 N. W. 25.

71—State v. Levy, 75 Pac. 227.

72—Webster v. State, 47 Fla. 108, 36 So. 584.

73—Davis v. Anchor Mut. Ins. Co., 96 Ia. 70, 31 L. R. A. 141, 64 N. W. 687; Bonney v. Cooke, 61 Iowa 303, 16 N. W. 139.

74—State v. Wilson, 99 N. W. 1060.

75—O'Donnell v. Weiler, 72 N. J. Law 142, 59 A. 1055; State v. Forsha, 190 Mo. 296, 88 S. W. 746.

76—May v. Elam, 27 Iowa 365

77—National Bank of Boyertown v. Schufelt, 82 S. W. 927 (I. T.).

78—State v. Brownlee, 84 Iowa 473, 51 N. W. 25; State v. Winter, 72 Iowa 627, 34 N. W. 475.

79—Martin v. Farmers' Mut. Ins. Co., 139 Mich. 148, 102 N. W. 656.

qualified jurors, and sufficient ground for reversal when the trial is compelled to be had before obnoxious jurors.[80] The determination of the trial court as to a juror's partiality will be interfered with on appeal, only when his examination on the *voir dire* shows bias as a matter of law.[81] The question as to the qualifications of jurors is left largely to the discretion of the trial court, and its ruling will be reversed only when such an abuse of discretion is clearly manifest.[82] In the event of a court properly taking a case away from the jury and directing a verdict, all errors in ruling on challenges will of course be without prejudice.[83]

A re-examination of a juror after acceptance, and even after tacit acceptance of the whole panel, may be permitted by a trial court in its discretion to remove or clear up any possible doubt concerning the competency of any juror.[84]

§ 37. Examination—By Whom Conducted. In some states the presiding judge is required to conduct the examination. When the juror is thus found competent, he is tendered to the parties for either acceptance or rejection by them upon a peremptory challenge. In some instances an opportunity is allowed the parties notwithstanding this to examine the jurors in turn or to suggest questions to the court, and this method finds its justification in the fact that the sole judge of the competency of the juror is the court itself.

Questions that may be asked a juror to test his competency may be prescribed by statute, and in some states these are the only proper questions that may be asked, although they may be varied in phraseology to suit the mental capacity of a juror. The parties are allowed to show that the answers are false by means of other evidence. This method has been held not to impair the right to trial by an impartial jury.[85]

Summary. In fact, it may all be summed up as follows:—The competency of a juror on a challenge for cause is for the sole and final determination of the court upon the facts dis-

80—Decker v. Laws, 74 Ark. 286, 85 S. W. 425; San Antonio & A. P. R. Co. v. Lester, 13 Tex. Ct. Rep. 813, 89 S. W. 752.

81—Graybill v. DeYoung, 146 Cal. 421, 80 Pac. 618.

82—Anson v. Dwight, 18 Iowa 241; Dav. G. L. Co. v. City Dav., 13 Ia. 229; Dively v. City, 21 Iowa 565; Cramer v. Burlington, 42 Iowa 315; McGinty v. Keokuk, 66 Iowa 725, 24 N. W. 506; Geiger v. Paine, 69 N. W. 554, 102 Ia. 581.

83—Melerup v. Travel Ins. Co., 95 Ia. 317, 63 N. W. 665.

84—Belt v. People, 97 Ill. 461.

85—Woolfolk v. State, 85 Ga. 69, 11 S. E. 814.

closed by the examination. This examination may be made by the court alone, in which case the questions must be of a general nature and not seemingly in the interest of either of the parties; or assisted by counsel on either side, suggesting questions which the judge may propound; or the examination may be by questions propounded to the juror in turn by counsel after the examination of the court; or for counsel on either side to conduct the examination themselves under the supervision and restriction of the court, supplemented by the court in its discretion; or by statutory questions; or by evidence *aliunde* produced before the court by the parties.

CHAPTER III.

IMPANELING THE JURY—Continued.

CHALLENGES FOR CAUSE.

§ 38. Personal Exemptions—Age. Although the common law is superseded by statutes prescribing the disqualifications of jurors in most of the states,[1] and it is of course necessary to consult the particular statutes of the state in which the court sits, yet in the absence of statutes the general provisions of the common law apply.

We may enumerate some of the various grounds of challenge for cause, as they existed at common law and under the statutes and practice of the various states:

Challenges would seem to be good for all causes which render a person exempt from jury service. There is some conflict in the reasoning of the courts upon this matter, however, and it is held that exemption from jury service is not strictly a cause

1—Com. v. Wong Chung, 186 Mass. 231, 71 N. E. 292.

for challenge, but merely a personal privilege to the party, which may be waived.[2]

Statutory provisions exempting all persons who are over sixty-five years of age from liability to act as jurors, does not make persons over that age incompetent, and such persons are liable to serve unless they personally claim the privilege of exemption.[3] It is held in Nebraska that it is not a good ground for challenge that a juror is more than sixty years of age.[4] There is equally good authority to the effect, however, that the age of talesmen being in excess of that prescribed by statute is good as a challenge for cause.[5]

§ 39. **Prior Service as Juror.** It is held that prior service as a juror within a certain time, usually a year, preceding the term at which he is challenged, is a good cause for challenge.[6] Previous service as a juror is held to disqualify only such persons as have actually served within that time.[7] Former service within a year as a juror in court of record must appear to have been in that county, to be a good cause for challenge.[8] It is held that ineligibility because of previous service in the same court during the year renders a juror incompetent "*propter defectum*" and is a good ground for challenge, but when this was not known until after verdict and sentence, it is not a cause for a new trial.[9] It also disqualifies one to have been sworn within the year as a grand juror; the statute prescribing disqualifications for one who has been sworn as a "juror" applies also in this instance.[10] An exemption on account of prior service as a juror should be liberally construed and allowed as a challenge for cause, in view of the evil of professional jurors, which it was especially designed to correct.[11]

In Illinois it is a ground for challenge to a petit juror "that

2—State v. Adams, 20 Iowa 486; Murphy v. People, 37 Ill. 447; Davison v. People, 90 Ill. 221; State v. Edgerton, 100 Iowa 63, 69 N. W. 280.

3—State v. Edgerton, *supra.*

4—Keeler v. State (Nebr.), 103 N. W. 64.

5—R. Co. v. Moosman, 82 Ill. App. 176; Murphy v. People, 37 Ill. 447; 19 Ill. 74.

6—Brooks v. Jennings Agri. Joint Stock Assn., 35 Ind. App. 221, 73 N. E. 951; Barnes v. Newton, 46 Iowa 567.

7—Humphrey v. State, 74 Ark. 554, 86 S. W. 431.

8—Gropp v. People, 67 Ill. 154.

9—Hill v. State, 122 Ga. 166, 50 S. E. 57.

10—Bissel v. Ryan, 23 Ill. 517; Brooks v. Bruyn, 35 Ill. 392.

11—Burden v. People, 26 Mich. 162; Williams v. State, 45 Ind.

he has served as a juror on a trial of a cause in any court of record in the county within one year previous to the time of his being offered as a juror."[12]

Having already sat on a trial of the same issues is a good ground of challenge, or having served as a grand or trial juror in a criminal case based on the same transaction.[13]

A juror is not disqualified who has sat upon a panel that convicted another defendant of a similar kind, but not connected with the crime for which the defendant is being tried.[14] But where the offense for which the defendant is being tried arose out of the same matter, and the same evidence is relied on, a juror that sat on a former trial of one of the co-defendants indicted for the same offense may be challenged for cause.[15]

§ 40. **Grounds for Challenge**—*Alienage.* Alienage is held to disqualify a juror. A statute which in some states expressly qualifies citizens natural born or naturalized for jury service necessarily disqualifies all others.[16]

Alienage of a juror has been held by one court not to be an absolute disqualification, but merely an exemption, enabling him to excuse himself.[17]

Where peremptory challenges have not been exhausted, the alienage of a juror has been held not to constitute a good ground for challenge for cause.[18]

Character. A good ground of challenge for cause is that a

299; Williams v. Grand Rapids, 53 Mich. 271, 18 N. W. 811; Bissel v. Ryan, 23 Ill. 517.

12—Vol. 6, Starr & Curtis Ann. Ill. Stat., Sec. 14, p. 2391, Plummer v. People, 74 Ill. 361.

In Iowa the code provides that persons "holding office under the laws of the United States or the State of Iowa, practicing attorneys, physicians, registered pharmacists, clergymen, acting professors or teachers, members of any fire company, persons disabled by bodily infirmity, or over sixty years of age, or any persons conscientiously opposed to acting as a juror because of religious faith" are all exempt from jury service. The fact that a person is a minor would seem to be equally good as a ground of challenge following this line of reasoning.

13—Code of Iowa.

14—State v. Van Waters, 37 Pac. 897; People v. Albers, 137 Mich. 678, 100 N. W. 908; Birdsong v. State, 120 Ga. 850, 48 S. E. 329.

15—People v. Mol, 137 Mich. 692, 100 N. W. 913.

16—Greenup v. Stoker, 3 Gilm. 202; Shoemacher v. State, 5 Wis 324; State v. Vogel, 22 Wis. 449.

17—Chase v. People, 40 Ill. 352.

18—Territory v. Hart, 14 Pac. 768.

person is not of good moral character[19] or "not of fair character and approved integrity" according to the statutes of Illinois.[20]

Mental Unsoundness. All persons mentally incompetent, idiots or persons of unsound mind may be challenged. Having such defects in the faculties of mind, or in the organs of the body, as to render the juror incapable of performing the duties of a juror is a good ground of challenge in the state of Iowa. Jurors must be in possession of their natural faculties and not infirm or decrepit, and a lack of these qualifications is also sufficient cause of challenge in the state of Illinois.[21]

Not Being a Qualified Elector. It has been held that a juror is incompetent who is not a qualified elector.[22]

Having a Cause Pending at Same Term of Court. Having a cause pending and at issue, at the same term of court is generally considered a good cause for challenge.[23]

Consanguinity or Affinity. Consanguinity or affinity to the adverse party within certain prescribed degrees, computed according to the civil law and placed at the ninth degree under the common law practice is ground for challenge. While affinity, or relationship by marriage is sufficient, yet the death of the party through whom the relationship was created will dissolve the tie, except where living issue survive.

A venireman in a murder case, who was married to the second cousin of the deceased, was properly excused because related within the sixth degree by affinity.[24] Relationship to an attorney in the case has been held to be a good ground of challenge for cause, especially where the attorney has an interest in the verdict by way of fees to be paid therefrom.[25]

Where a juror on his *voir dire* testified that he knew the parties, but was not related to them, and was able to decide the case on the evidence without regard to who the attorneys were, but was not asked whether he was related to them or not, a judgment would not be reversed although the juror was

19—Manning v. Boston El. Ry. Co. (Mass.), 73 N. E. 645.

20—Vol. 2, Starr & Curtis Ann. Ill. Stat., Sec. 2, p. 2386, sec. 14, p. 2391; Plummer v. People, 74 Ill. 361.

21—Vol. 2, Starr & Curtis' Ann. Ill. Stat., Sec. 2, p. 2386, Sec. 14, p. 2391. Plummer v. People, *supra.*

22—State v. Groome, 10 Iowa 308.

23—Plummer v. People, *supra.*

24—State v. Byrd, 72 S. C. 104, 51 S. E. 542.

25—Melson v. Dickson, 63 Ga. 682, 36 Am. Rep. 128.

in fact married to a first cousin of one of the attorneys.[26] It has been held that a juror's relationship as the son of a stockholder in a corporation that is a party to the action, was a good ground for challenge.[27] In the absence of statute fixing the degrees of relationship, it is held to be a question of bias, to be determined by the court as to whether a juror's relationship to the party would render him incompetent.[28]

A court may discharge a juror on the ground of kinship even after he has been accepted and sworn.[29] An objection on the ground of relationship is considered waived, if it is known and not taken advantage of before the verdict.[30]

§ 42. Ignorance of English Language. Ignorance of the English language is held to be a good cause for challenge.[31] A disqualification, because of inability to read or write the English language is held not unconstitutional, as the qualifications of jurors may be prescribed without contravening the right of trial by jury[32] and indeed a trial by jurors unable to speak or understand the English language is in direct violation of the right of trial by jury.[33]

§ 43. Intimate Knowledge of Material Issues Involved. Intimate knowledge of material issues involved in the case on the part of a juror is held to be a sufficient ground of disqualification,[34] but the knowledge of incidental facts, or those collateral to the material issues of the case, does not render the juror incompetent.[35] However if the juror has such a knowledge of material facts as will tend to bias his opinion, he is considered incompetent and may be challenged for cause.[36]

There is also a further ground for the discharge of a juror

26—Kelso v. Kuehl, 93 N. W. 455, 116 Wis. 495; People v. Waller, 70 Mich. 237, 38 N. W. 261.

27—Georgia Ry. Co. v. Hart, 60 Ga. 550.

28—Sims v. Jones, 43 S. C. 91, 20 S. E. 905.

29—Dorman v. State, 37 So. 561, 48 Fla. 18.

30—Hadden v. Thompson, 118 Ga. 207, 44 S. E. 1001; State v. Pray, 99 N. W. 1065.

31—State v. Ring, 29 Minn. 78, 11 N. W. 233; Atlas Mining Co. v. Johnson, 23 Mich. 36.

32—State v. Welsor, 117 Mo. 570, 21 S. W. 443; Rafe v. State, 20 Ga. 60.

33—Lyles v. State, 41 Texas, 172, 19 Am. Rep. 38.

34—Johnson v. Park City, 27 Utah 420, 76 Pac. 216.

35—Delaney v. Salina, 34 Kan. 532, 9 Pac. 271; People v. Keefer, 97 Mich. 15, 56 N. W. 105; State v. Martin, 28 Mo. 530; Dew v. McDavitt, 31 Ohio St. 139.

36—McIntire v. Hussey, 57 Me. 493; Atkins v. State, 60 Ala. 45; Laverty v. Gray, 3 Mart. La. 617; Buddee v. Spangler, 12 Colo. 216. 20 Pac. 760.

found to possess knowledge of facts material in the case aside from that of his possible prejudice by reason of his knowledge, and that is that the party may use him as a witness. Of course, as before stated, the juror could be a competent witness, but the opposing party would hardly dare to impeach him as a witness nor could he adequately cross-examine a juror for fear of offending him.[37]

A juror is not supposed to be a blockhead and he may bring to bear upon the case and has a right to use his own knowledge of the common facts and general information which he may possess, not directly involving the specific issues in controversy but which by way of comparison may elucidate the controversy.

It may transpire that a particular juror, by reason of his trade or education, has a peculiar and specific knowledge of a special subject connected with the case, as, for instance, an engineer sitting as a juror may possess a special knowledge connected with the matter of running an engine that none of the other jurors possess. It then becomes a question as to whether such a juror is in duty bound figuratively to divest himself of such superior intelligence and to act solely upon the evidence and the expert testimony received in court for the purpose of supplementing the general knowledge of the jurors or whether he may act upon his own expert knowledge and information.

It would seem to be impossible to draw the line upon so intangible a matter as a person's stock of knowledge and certainly it would be an impossibility ever to secure a jury equal in mental power and in their stock of information. It is true that the parties in court have no means of knowing whether the information possessed by the juror was correct or not.

There would also be no means of correcting it if erroneous, but this is no real objection and could be urged with equal force against any false judgment, erroneous conclusion, or illogical conception that a juror may have.

From this it seems to follow that it is the right and duty of the jury to marshal in array all of their personal knowledge, information, human experience, intuition with their physical senses in passing upon the evidence in the case.

37—Juror may be an interpreter: People v. Thiede, 11 Utah 241, 39 Pac. 837, 159 U. S. 51. In this case the accused consented thereto.

§ 44. Intimate Friendly Relations with Opponent or his Family. Intimate friendship with one of the parties is held to disqualify a juror, especially where it is of such an intimate nature as to influence him in the verdict.[38] Intimate friendship, as where the plaintiff had been an attorney for the juror and had named one of his children for him on account of his regard, was held a ground of disqualification.[39] However, the decisions are not entirely uniform upon this point, and a juror has been held not to be disqualified on the ground of bias where the plaintiff was his family physician. for the reason that the court would not usually exclude competent men as jurors for arbitrary or technical reasons.[40]

§ 45. Relationship of Duty or Obligation, as Employer, Partner or Otherwise. A relationship of duty or obligation to a party to the action on account of past or promised favors is held to disqualify a juror on challenge for cause. For instance, a guest who receives gratuitious board is disqualified in an action wherein his landlord is a party, but if he is under obligation to pay, it might be otherwise.[41] Being in the employ of either party as servants or otherwise is held to disqualify a juror in the same manner as it did at common law,[42] but the performing of some mere clerical work by one of the jurors for one of the party is held not to be a sufficient ground of challenge for bias.[43]

Being in the relationship of partners or that of landlord and tenant, so that the juror might ordinarily seek to favor such a party, or being under his control in any way is a good ground of challenge. It is held not proper to ask a juror concerning his pecuniary obligations to a party to the case,[44] although it would seem to have a bearing on the question of bias, as well as any other question that might be asked. All of these matters concerning the relationship of duty or obliga-

38—Omaha St. R. Co. v. Craig, 39 Nebr. 601, 58 N. W. 209.

39—R. Co. v. Blanton, 81 S. W. 537.

40—Chesapeake & Ohio Ry. Co. v. Smith, 49 S. E. 487, 103 Va. 326; Brown v. McNair, 82 S. W. 677.

41—Cummings v. Gann, 52 Penn. 484.

42—Hubbard v. Rutledge, 57 Miss. 7; Louisville T. R. Co. v. Mask, 64 Miss. 738, 2 So. 360; Central R. Co. v. Mitchell, 63 Ga. 173.

43—Swope v. Seattle, 36 Wash. 113, 78 Pac. 607.

44—Richardson v. Planters Bank, 94 Va. 130, 26 S. E. 413.

tion, must, however, be presently existing in order to be of any consequence.

§ 46. **Membership in Churches, Societies and Associations.** Membership of a juror in a secret society or association with one of the parties has been held a good ground for challenge for cause,[45] although this would seem to be very extreme to say the least. In Kentucky it was held, on the contrary, that veniremen who were Catholic were not disqualified for that reason in an action by a Protestant against a Catholic eleemosynary institution.[46] Membership of a juror in a certain church was held a good ground of challenge for cause, where the trustees of that church were parties to the action; but this was on account of the beneficial interest which they sustained.[47]

Persons who are members of a society liable to assessments for funds to prosecute violations of liquor laws are not competent jurors to try defendant charged with selling liquor without a license.[48] Persons who are members of a mutual insurance company and liable to an assessment to pay any judgment which might be rendered against it are not qualified to sit as jurors in an action against the company.[49]

§ 47. **Member or Shareholder of Corporation—Taxpayer of County.** Being a member of, or a shareholder in, a public or private corporation which is a party to the suit is a good ground of challenge, which the adverse party may make to a juror and is allowed on the ground of interest. Thus, it has been held that the membership of a juror in a corporation holding stock in another corporation, when such corporation is a party to the action, has been allowed as a good challenge for cause.[50] But a juror is not disqualified by interest merely because his employer is a stockholder of the corporation that is a party to the action.[51]

In an action against a city for damages a taxpayer of a

45—Purple v. Horton, 13 Wend. 9, 27 Am. Dec. 167.

46—Smith v. Sisters of Good Shepherd, 27 Ky. Law 1170, 87 S. W. 1076 (1083).

47—Cleage v. Hyden, 6 Heisk 73.

48—Jackson v. Landman, 45 N. Y. S. R. 633, 18 N. Y. Supp. 894; State v. Fullerton, 90 Mo. App. 411.

49—Martin v. Farmers' Mut. Fire Ins. Co., 139 Mich. 148, 102 N. W. 656.

50—McLaughlin v. Louisville Elec. Lgt. Co., 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812.

51—Dimmack v. Wheeling

city is held subject to challenge for cause, and this is true even though he is a non-resident of the city.[52] Taxpayers of the county being disqualified by reason of interest as jurors, in a suit against the county for damages, it would seem that a change of venue was inevitable, as in Iowa.[53] It is held in this same case that where a plaintiff could by right have a change of venue in such an action, that he virtually waived his challenges to the jurors for cause on this ground by going to trial without asking for a change of venue.[54]

On the contrary it is held, in Utah, that the qualifications for exclusion cannot be based on such partisan grounds as that of being a taxpayer in the city or county that is a party to the suit.[55] By statute in many other states it is provided that no challenge for cause may be allowed in such instances.

A juror is held to be incompetent who is interested in the result of the cause on trial, but this is not construed as an interest, merely, which he might have in the legal questions involved;[56] it must be something of a material and pecuniary nature, directly affecting him in a personal way, as, for instance, having made a wager on the result of the case, or being on the bond of one of the parties.

A juror may also be challenged for cause when he has litigation pending with one of the parties to the suit.

§ 48. Prejudice, Partiality or Bias. Prejudice, partiality or bias of any nature, so that the juror could not be as fair on the trial of the case on hand as he would want a juror to be on his own case, are grounds of challenge. The legal disqualification of a juror must be tested by something more certain than the bare possibility that he might be prejudiced by his belief of an immaterial fact.[57] A suspicion of guilt raised in a juror's mind by reason of the fact that an indictment had been found was held not to be a good ground for challenge for cause,[58] and a statement by a juror that it would

Tract. Co., 52 S. E. 101, 58 W. Va. 226.

52—Kendal v. Albia, 73 Iowa 241, 34 N. W. 833.

53—Wilson v. Wapello County, 105 N. W. 363, 129 Ia. 77.

54—Id.

55—Reece v. Knott, 3 Utah 451, 24 Pac. 757.

56—Miller v. Wild Cat Gravel Road Co., 52 Ind. 51-59. A holder of bonds, similar to those sued on, has been held subject to challenge for cause. Jefferson Co. v. Lewis, 20 Fla. 980.

57—People v. Albers, 137 Mich. 678, 100 N. W. 908.

58—Gillespie v. People, 176 Ill. 243, 52 N. E. 250.

demand a stronger defense in the case of this defendant than that of another was held a good ground for challenge.[59] No bias is shown, however, when a juror states on his *voir dire,* that he knows neither of the parties and nothing about the case, and that he could not say that his sympathies were for either, and that his verdict would depend on the evidence.[60]

Jurors should not only be impartial at the time they are selected, but should of course remain so throughout the trial.[61] Jurors, however, who have had more or less active connection with the matters upon which the issues are based can hardly be said to be of a sufficiently fair and impartial frame of mind to try the case properly; so that, for instance, jurors who are members of a posse that ran down the defendant on trial would not be considered as impartial.[62] So also, an active participant at a political meeting would not be a qualified juror in an action for libel growing out of words spoken at that meeting.

In a criminal case the court should be satisfied that a juror is impartial, and the conduct and demeanor of the juror must show affirmatively that he is so.[63] If, however, the parties themselves choose to accept a prejudiced juror, the court should not refuse them the right.[64]

§ 49. **Prejudice against the Subject Matter of the Action.** Prejudice against the very matter out of which the action grew, as, for instance, an action against a seller of intoxicating liquors involving matters of his business, is held not to be a good ground for challenge for cause, except where the prejudice is of a violent nature, or where, as we have already stated, the juror is a member "of an association formed to enforce a particular law, and is bound to contribute money for that purpose."[65]

That a juror dislikes or has prejudice against the vocation of a saloon keeper is not a ground for challenge in the absence

59—Billmeyer v. St. Louis Transit Co., 82 S. W. 536, 108 Mo. App. 6; State v. John, 100 N. W. 193; State v. Roberts, 77 Pac. 598.

60—Schwartz v. Lee Gon. Oreg., 80 Pac. 110.

61—Albers v. San Ant. R. R. Co., 81 S. W. 828; People v. Mol., 137 Mich. 692, 100 N. W. 913; Riley v. State, 81 S. W. 711.

62—State v. Duncan, 47 La. Ann. 1025, 17 So. 482.

63—Lucas v. State, 105 N. W. 976.

64—Van Blaricum v. People, 16 Ill. 364.

65—Lavin v. People, 69 Ill. 303; Musick v. People, 40 Ill. 268; State v. Kelley, 78 Pac. 151; Dodd v. State, 82 S. W. 510.

of prejudice against this particular defendant,[66] but where a juror states that he can give a fair trial and be governed by the law and the evidence, he is not disqualified in an action against a saloonkeeper by reason of prejudice against persons in general who are engaged in that business.[67]

Where the prejudice is so violent, however, that, as he says, he would do all in his power, except raise mobs to break down places used for the business,[68] or where the juror says he would not give the same weight to the testimony of the witness engaged in selling intoxicating liquors that he would to that of another person, he is held to be disqualified.[69]

A trial court may excuse a juror in its discretion, although he is not legally disqualified, when the sitting of the juror is reasonably liable to give either party an apprehension of unfairness.[70] A juror who states that he has a prejudice against such cases as the one on trial, which would require evidence to remove, but that he knows nothing about this particular case and has no prejudice concerning it, and would try it on its merits, is held not to be disqualified.[71]

§ 50. Prejudice against Insanity or Statute of Limitations. A prejudice against insanity as a defense will not disqualify where the juror testifies that he will follow the law as laid down in the instructions of the court. Prejudice in order to disqualify, must extend to that particular form of insanity relied upon as a defense.[72]

Where the defense relied upon was insanity, which appeared to have been caused by liquor, a juror on his *voir dire* stated that he could not give that defense the same weight as any other. The court then asked the juror, if it should appear that the accused was insane from any cause whatsoever, whether he would give the accused the benefit of the doubt. The juror replied affirmatively, and was held not to be disqualified on that ground.[73]

66—Albrecht v. Walker, 73 Ill. 69; Kreer v. People, 78 Ill. 294; Carrow v. People, 113 Ill. 550.

67—Robinson v. Randall, 82 Ill. 521.

68—Albrecht v. Walker, *supra.*

69—Robinson v. Randall, *supra;* Meaux v. Whitehall, 8 Ill. App. 173.

70—Glasgow v. Metropolitan St. Ry. Co., 89 S. W. 915, 191 Mo. 347.

71—Denham v. Wash. Water Power Co., 38 Wash. 354, 80 Pac. 546.

72—State v. Howard, 77 Pac. 50; Gammons v. State, 85 Miss. 103, 37 So. 609.

73—State v. Croney, 31 Wash. 122, 71 Pac. 783.

A juror may be asked if he is prejudiced against the statute of limitations which the party has pleaded.[74]

§ 51. Prejudice against Class of Litigants—Circumstantial Evidence. A juror may be asked if he has any prejudice against the class of litigants to which the party to the action belongs.[75] It is also proper to ask a juror if he is prejudiced against those of the Jewish faith; but he could not be asked, however, if the testimony of Jewish witnesses would receive as much credit as any witness of another faith.[76]

A prejudice against the negro race, not sufficiently strong to prevent the juror from affording the prisoner a fair trial, will not disqualify him when he has no prejudice against the prisoner personally.[77]

It is held that a juror cannot be asked if he is prejudiced against corporations.[78] A juror who had an action against a Street Railway Company for injuries several years before, and had a prejudice against such companies in general, sufficient to influence him on the trial, was held disqualified, although he testified that he would be governed by the evidence and the instructions of the court.[79] A contrary ruling seems to have been made on this point, which seems to be lacking in good and sound reason, where it was held that no bias was shown in an action for libel on the part of a juror who stated that he thought such actions speculative and often unwarranted, that he had the same opinion of all kinds of damage suits, and that such an opinion might create a prejudice, although he would try the case at issue on the evidence given.[80]

Prejudice against circumstantial evidence has also been held sufficient as a ground for challenge for cause and that even in a case which does not depend upon such evidence.[81]

§ 52. Scruples against Capital Punishment. Conscientious scruples against capital punishment in criminal cases dis-

74—Towl v. Bradley, 108 Mich. 409, 66 N. W. 347.

75—Patrick v. State, 78 S. W. 947, 45 Tex. Crim. App. 587.

76—Horst v. Schuman, 29 Wash. 233, 55 Pac. 52.

77—State v. Brown, 188 Mo. 451, 87 S. W. 519.

78—Atl. & D. R. Co. v. Reiger, 95 Va. 418, 28 S. E. 590.

79—Theobaldt v. St. L. Tract. Co., 191 Mo. 395, 90 S. W. 354.

80—Graybill v. DeYoung, 146 Cal. 421, 80 Pac. 618.

81—Calhoun v. State, 143 Ala. 11, 39 So. 378; Whatley v. State, 144 Ala. 68, 39 So. 1014; People v. Warner, 147 Cal. 546, 82 Pac. 196; Johnson v. State, 71 S. W. 25, 44 Tex. Crim. App. 332; Ryan v. State, 115 Wis. 488, 92 N. W. 271.

qualify a juror[82] where the state is demanding the same, especially upon circumstantial evidence,[83] or, in fact, upon any evidence whatsoever. A juror who states that he would be very reluctant to agree to a verdict of guilty in a capital case, but might be starved to render it, is held disqualified.[84]

Where a juror informs the court that he has conscientious scruples against capital punishment, the state may be allowed to peremptorily challenge him, even after he has been accepted on the jury.[85] Conscientious scruples against a death penalty have been held to disqualify a juror, even where the jury may in their discretion substitute a life sentence.[86]

It is the duty of the court to see that a jury is organized which will be willing to assess the penalty that the law allows.[87] It has been held, however, that a court is not obliged of its own motion to set aside a juror who has opinions against capital punishment[88] although it may do so, even against the defendant's objection,[89] and the fact that the juror was not challenged by the state does not preclude the court from so excusing him.[90]

§ 53. Previous Conversation with One of the Parties. Having had conversation with one of the parties relative to the merits of the case, or with one who knows or professed to know the facts, may be a sufficient cause for challenge on the ground of bias.

The statement of a juror that he had talked with one who had claimed to know the facts; that he had formed an opinion from this conversation; that this would influence him as a juror and that he would not act with impartiality shows him to be disqualified.[91] Mere conversation with a witness and belief in what he says does not necessarily disqualify, where no opinion is formed relative to the main issue or to the guilt or innocence of defendant.[92]

82—Gates v. People, 14 Ill. 433.

83—People v. Warner, 147 Cal. 546, 82 Pac. 196; Gates v. People, 14 Ill. 433.

84—Gates v. People, *supra.*

85—Brewer v. State, 78 S. W. 773.

86—Caldwell v. State, 41 Texas 86.

87—Gonzales v. State, 31 Texas 508, 21 S. W. 253.

88—Murphy v. State, 37 Ala. 142.

89—Waller v. State, 40 Ala. 325.

90—State v. Vick, 132 N. C. 995, 43 S. E. 626.

91—People v. Cebulla, 137 Cal. 314, 70 Pac. 181.

92—Thompson v. People, 24 Ill. 61.

§ 54. **Having Formed or Expressed an Opinion.** Having formed or expressed a fixed, definite and unconditional opinion as to the guilt or innocence of the defendant in a criminal case, or as to the merits of the case in a civil action, such as will take evidence to remove, will disqualify even though the juror believes that he could disregard this opinion and try the case according to the law and evidence.[93] This opinion must, however, not be of a light character, but one of a more or less decided nature,[94] such as is not the result of mere rumor or of chance report, nor of a hypothetical nature, conditioned on the truth of what has been reported. But where it clearly appears from the examination that the juror has a fixed and positive opinion as to the merits of the case he is called to try, from whatever source derived, or however arrived at, he is to be regarded as incompetent. It will make no difference that he states that he can render a fair and impartial verdict according to the law and the evidence; such a statement cannot be deemed to disprove the existence of a fixed opinion already admitted, as such admission is not to be overcome by evidence. And this with greater reason where his examination exposes a positive opinion, not only as to the main question, but as to most of the facts and circumstances relied on to make out a case, and a prejudice against not only the immediate party but an organization of which he is a member; and so also where his statement as to his belief in his competency is apparently the result of an argumentative examination on the part of the court, pointing out the duty of a good citizen.[95]

Jurors who have formed opinions from statements heard are not disqualified, it has been held, where they did not know whether the persons making the statements knew the facts, and where they state that they were able to try the case on the law and the evidence.[96]

Where the examination of a juror shows that he has formed and expressed an opinion which would require strong evidence to remove and that his mind is influenced to a great extent by the opinion already formed, he is held incompetent, although he says that he could go into the jury box and disregard such opinion, if the evidence was strong enough.[97] On the contrary

93—State v. Riley, 78 Pac. 1001; Turner v. State, 69 S. W. 774.

94—Gardner v. People, 3 Scam. 83; Lycoming Fire Ins. Co. v. Ward, 90 Ill. 545.

95—Coughlin v. People, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57.

96—Wilson v. State, 70 S. W. 57.

97—State v. McCoy, 33 So. 730, 109 La. 682.

there is some authority that seems to hold that an opinion which would take some evidence to remove does not render the person incompetent where he will be governed by the evidence and can give the party a fair, impartial trial, according to the instructions and evidence.[98]

§ 55. Opinions Formed from Reading Newspaper Articles. To have read accounts in the newspapers, upon which the juror has formed an opinion, is sufficient to disqualify him, unless he shall state under oath that he can fairly and impartially render a verdict in accordance with the law and the evidence produced on the trial, and the court shall be satisfied thereof. The test is whether the juror will base his verdict upon the account which may be given by the witnesses on the trial and not whether the opinion which he has formed from the newspapers will be changed by the evidence. This is held not to violate the constitution of the United States, Section 1, amendment XIV, guaranteeing to the accused "a speedy trial by an impartial jury."[99]

The reading of an account of the case does not disqualify where the reading makes no impression on the juror's mind and is not remembered.[100] A juror who has read newspaper accounts and talked of the crime, but formed only a slight

98—Wilson v. People, 94 Ill. 299.

A juror who has heard part of the testimony on a former trial of the case, but who states that he can lay aside the opinion formed from such testimony and decide solely on the evidence produced on the second trial, without reference to what he has heard before, is not disqualified on a challenge for cause. State v. Prins, 117 Iowa 505, 91 N. W. 758.

One of the grand jurors, on a former indictment against the defendant, has been held not to be disqualified on a subsequent trial, when he swears he will give the defendant a fair, impartial trial, even though the grand juror had made a statement to the effect that he would convict this defendant if he sat on any jury trying him for the former offense. Robinson v. Commonwealth, 52 S. E. 690, 104 Va. 888.

A venireman who discloses on his *voir dire* examination that he has formed an opinion that would take considerable evidence to remove is disqualified for actual bias, whether he obtained such opinion from hearing the testimony on the former trial, or talking with the jurors, or with witnesses who testified therein. State v. Miller, 46 Oreg. 485, 81 P. 363.

99—People v. Warner, 82 Pac. 196, 147 Cal. 546; Sec. 14, ch. 78, p. 2391, Starr & Curtis Ann., Ill. Stat; Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320 n.

100—Gradle v. Hoffman, 105 Ill. 147.

opinion, is competent although he states that evidence is required to change it.[1]

A juror who has read newspaper accounts, but who has formed no opinion, is of course not disqualified.[2] An opinion based on newspaper reports does not disqualify where a juror states on oath that he could render an impartial verdict in accordance with the law and the evidence;[3] but where the juror omits to state that he could render an impartial verdict notwithstanding the reading of the newspaper account, he would be held disqualified.[4]

The constitutional guarantee of a trial by an impartial jury is not violated by refusing a challenge to a juror who has formed an opinion from reading the newspapers if the juror swears that he can render an impartial verdict.[5] This, however, does not make the oath of the juror that he is impartial conclusive as to the fact, as that would still remain a matter for the judgment and discretion of the court.[6]

There is some authority to the point that opinions and impressions gained from the reading of newspapers that can be removed by evidence do not disqualify if the juror is able to go into the jury box with his mind perfectly free, neither in favor of one side nor the other.[7] There is also a holding that an impression that can be removed by testimony will not be sufficient to disqualify.[8]

The best opinion, however, seems to be that a juror who states that he has an opinion which would require strong evidence to remove is disqualified.[9] Under the Code of Cr. Proc. Sec. 376 of N. Y. a juror is *prima facie* disqualified who has

1—Wilson v. People, 94 Ill. 299.

2—McCue v. Com., 49 S. E. 623, 103 Va. 870; State v. Lewis, 181 Mo. 235, 79 S. W. 671.

3—McHughe v. State, 42 Ohio St. 154; Palmer v. State, 42 Ohio St. 596; People v. Thiede, 11 Utah 241, 39 Pac. 837; State v. Sykes, 191 Mo. 62, 89 S. W. 851; Strut v. State, 90 Ind. 1; Spies v. People, *supra;* Lindsay v. State, 4 Ohio C. C. 409; State v. Mott, 29 Mont. 292, 74 Pac. 728; Barker v. State, 103 N. W. 71 (Neb.); Jahnke v. State, 94 N. W. 158; State v. Gartrell, 71 S. W. 1045, 171 Mo. 489; Dimmick v. U. S., 121 F. 638, 57 C. C. A. 664.

4—Fugitt v. State, 33 So. 942, 82 Miss. 189; Eason v. State, 65 Tenn. 466.

5—U. S. v. Schneider, 21 D. C. 381.

6—Fugate v. State, *supra.*

7—State v. Croney, 31 Wash. 122, 71 Pac. 783.

8—Gammons v. State, 85 Miss. 103, 37 So. 609.

9—Fugate v. State, *supra.*

formed an opinion from reading city newspapers which it would take strong evidence to remove and should be excluded unless he is able to state under oath that such opinion would not influence his verdict and the court is satisfied of that fact.[10]

A juror who states that the fact that the defendant had been held to answer would in his mind raise a presumption against him is not disqualified under statutes providing in substance that an opinion founded on newspaper reports should not disqualify a juror who can act fairly on the merits of the case and give the defendant the benefit of a reasonable doubt.[11]

§ 56. Opinions Formed From Rumor or Hearsay. Opinions which are formed from rumor or hearsay disqualify a juror in the same measure as those gained from reading newspaper reports,[12] and he is not rendered competent merely by testifying that he would render an impartial verdict, unless it affirmatively appear that he would do so.[13] A juror who has formed an opinion from rumor and expressed it is not disqualified, even though he says he still adheres to that opinion "*if the rumor he heard was true,*"[14] but in this case there was a dissenting opinion which held that a disavowal of present belief in the rumor was necessary.

Where a juror has formed and expressed an opinion upon rumor or hearsay, but this opinion is conditioned on its truth, and he has no more reason to believe these reports than other

10—People v. Miller, 80 N. Y. S. 1070, 81 Ap. Div. 255, 17 N. Y. Cr. 263.

11—People v. Warner, 82 Pac. 196, 147 Calif. 546.

In the circuit court of the United States, Meyer v. Cadwallader, 49 Fed. 32, it was held that where comments in the daily papers are of so gross a nature as to be well calculated to prejudice the jury, and are evidently inspired by one of the parties, and are published during the trial and have been presumably seen by the jurors, a new trial will be granted.

It is no ground for a new trial of an action for personal damages that during the trial statements that plaintiff had been awarded damages to a large amount in a former trial were published in the newspapers, where there was no evidence that they had reached the jury. Ill. Cent. R. Co. v. Souders, 178 Ill. 585, 53 N. E. 408.

12—Funderburk v. State (Ala.), 39 So. 672; Reynolds v. State, 1 Ga. 222; Evans v. State, 87 Miss. 459, 40 So. 8; State v. Lyhes, 191 Mo. 62, 89 S. W. 851; State v. Williams, 82 Pac. 353.

13—Lucas v. State (Nebr.), 105 N. W. 976.

14—Smith v. Evans, 3 Scam. 76.

gossip in the neighborhood, he would not be disqualified as a juror;[15] but decided opinions which cannot be laid aside concerning the merits of the case, gained from personal knowledge, statements of the witnesses, relations of the parties, newspaper reports or rumor, disqualify a juror when challenged for cause.[16]

15—Gardner v. People, 3 Scam. 83.

16—Neely v. People, 13 Ill. 686.

CHAPTER IV.

IMPANELING THE JURY—Continued.

§ 57. Peremptory Challenges. General Observations. When efforts at removing a juror by a challenge for cause has failed, resort may then be had to peremptory challenges and this subject will now engage our attention. These may or not be made as the caprice or judgment of the parties shall dictate without giving or assigning any reason therefor, and without being required to do so.

The right of peremptory challenge was an ancient common law right, extended somewhat by modern statutes, so that it now embraces cases to which it did not originally apply at common law.

This right of peremptory challenge existed and was allowed at common law in the first instance, only upon the trial of felony cases punishable with death[1], in which case thirty-five challenges were allowed. It was finally settled by the House of Lords in 1843 that it was allowable in all felonies, whether capital or not.[2] Otherwise this right did not and does not now exist, except as it may be especially given under statutes.

The right of peremptory challenge is given to insure a person a fair trial and to permit the rejection by him of undesirable jurors. It is a rule of exclusion alone, and not made for the purpose of selecting a jury. It is made to protect from prejudice and the bias of any juror, fancied or real, that cannot be taken advantage of otherwise.

Although there is some contrary opinion, it seems that in-

1—Coke's Littleton, 156; Blackstone Com., Book 4, page 353.

2—Gray v. Reg., 11 G. I. Fin. 427.

formation may be elicited from a juror on his *voir dire,* which, although immaterial as a ground for a challenge for cause, yet might be of the utmost importance in determining on the use of his peremptory challenges.[3]

§ 58. When the Right of Peremptory Challenge Must Be Exercised. A party to an action has a right to reserve his peremptory challenges until a full panel is secured, free from challenges for cause, and judged to be competent by the court, for the reason that he may lose the value of this privilege unless he first ascertains who can be excluded for cause.[4]

It is provided in the statutes of Illinois that upon the impaneling of the jury in any civil cause now pending, it shall be the duty of the court, upon the request of either party or upon its own motion, to order the full number of twelve jurors into the jury box, before either party shall be required to examine any of said jurors touching their qualifications. It also provides that the jury shall be passed upon and accepted in panels of four by the parties commencing with the plaintiff before calling up another.[5]

3—Foley v. Cudahy Packing Co., 119 Ia. 246, 93 N. W. 284.

"It is complained that the court erred in permitting counsel for appellee to question certain jurors upon their *voir dire* as to their interest in the Union Casualty Co. It appears that an attorney representing that company was present with the attorneys for appellant at the trial. The question was proper at least for the purpose of enabling counsel to exercise their right of peremptory challenge, if for no other purpose. O'Hare v. C. M. & N. R. R. Co., 139 Ill. 151, 28 N. E. 923; Am. B. W. v. Pereira, 79 Ill. App. 90, and cases therein cited."

Iroquois Furniture Co. v. McRae, 91 Ill. App. 327 (343).

4—Strehman v. City of Chicago, 93 Ill. App. 206; Taylor v. Western P. Ry. Co., 45 Cal. 322; Sterling Bridge Co. v. Pearl, 80 Ill. 251; Chicago City R. Co. v. Fetzer, 113 Ill. App. 280.

5—Sterling P. R. Co. v. Pearl, 80 Ill. 251, Sec. 21, p. 2397, Vol. 2, Starr & Curtis' Ann. Stat. of Ill. In Strehmann v. City of Chicago, *supra,* the ruling of the court compelling the plaintiff's attorney to exercise the right of challenge when only eleven jurors were in the box and to pass conclusively on ten jurors when only the ten were in the box was an erroneous denial of the plaintiff's right.

In Sterling Bridge Co. v. Pearl, 80 Ill. 251, the court commented on and interpreted section 21 of the statute in regard to jurors, and said: "Neither party shall be required to examine them touching their qualifications unless there are twelve jurors in the box." And further said: "There must, when either party requires it, during all the time the jury is

When there are twelve men in the box, against none of whom a challenge for cause can be successfully proposed, the jury is completed, and must ordinarily be then accepted unless a juror is removed by peremptory challenge of either party. The challenged juror being thus removed, another is called in the usual way to fill the vacancy, he being subject, also, to a challenge for cause or to a peremptory challenge by either party as the case may be.

In the selection of a jury, it is the better practice to require the exercise of the peremptory challenges to be made alternately, commencing with the plaintiff and to refill the panel after each challenge.[6] A peremptory challenge may be interposed at any time before the jury is formed and the evidence introduced, if made in good faith;[7] but where a jury has been accepted, it is error to permit the plaintiff to peremptorily challenge a juror,[8] especially where the other party has previously exhausted his own peremptory challenges and can no longer challenge the substituted juror.[9]

A peremptory challenge may be allowed in Illinois, even after a jury has been accepted and sworn upon good and sufficient grounds, under the discretion of the court.[10]

§ 59. Number of Peremptory Challenges Allowed. The number of peremptory challenges which may be allowed is usually fixed by statutory provisions to suit the various cases to which they are made applicable. The number of peremptory challenges as first allowed at common law in capital cases was one short of three complete juries or thirty-five.[11]

At the common law if a challenge was made in excess of the thirty-five it was considered of so much importance that the punishment that might be meted out in case the verdict was guilty, was made excessive to the extreme.[12]

The number of peremptory challenges allowed to a single

being empaneled, be twelve jurymen in the box. So it is when one is challenged, even for cause or peremptorily, before proceeding further another must be called into the box."

6—Nicholson v. People, 71 Pac. 377. Iowa Code.

7—Silcox v. Lang, 78 Cal. 118, 20 Pac. 297; Hunter v. Parsons, 22 Mich. 96; Adam v. Olive, 48 Ala. 551; U. S. v. Daubner, 17 Fed. 793.

8—Dunn v. Wilmington W. R. Co., 131 N. C. 446, 42 S. E. 862.

9—Dunn v. Wilmington & W. R. Co., *supra;* Glenn v. State, 71 Ark. 86, 71 S. W. 254.

10—P. D. & E. R. Co. v. Puckett, 52 Ill. App. 222.

11—Coke on Littleton, p. 156.

12—Funk v. Ely, 45 Pa. St. 444.

person who is a party to an action is construed as being allowed to one side, either plaintiff or defendant, as the case may be, regardless of how many persons may be joined on the side.[13] This is true in all cases,[14] but especially so in actions of a civil nature.

In the state of Texas, persons jointly indicted may challenge separately, but not to the same number as allowed to a single defendant.[15] It is the usual rule that where evidence in a case is of such a nature that the acquittal of one would result in the acquittal of all, they should be required to join in their challenges.[16]

It seems that in the exercise of sound judgment and discretion a court may allow the parties additional challenges on the ground of a possible impairment of the right to challenge having been made by some action or erroneous ruling of the court.

In a case where the challenges are unequal on either side the one holding the greater number of peremptory challenges should challenge proportionately, so that both sides shall have used all their challenges at the same time.

A peremptory challenge must always be interposed in order and turn, or presumed to have been waived.[17] By waiving peremptory challenges and accepting the jury the party thereby waives any error of the court in overruling his previous challenges for cause.[18]

§ 60. Struck Juries. There is a form of jury known as the struck jury which may be briefly considered. It is so called from the manner in which it is derived, or rather the way the jurors are selected. This form of jury was well known, even in the earliest period of the common law, and was usually ordered for the trial of cases of great consequence or importance, or on account of the intricacy of the matters in issue. Its main purpose seems to have been the avoidance of incompetent jurors, or of a packed jury.

This form of jury was at first allowed only in the trial of

13—San Luis Obispo County v. Simas, Cal. App., 81 Pac. 972; Booth v. Territory Ariz., 80 Pac. 354.

14—Lorenz v. U. S., 24 App. D. C. 337.

15—R. S. Texas, 1879, Art. 635, 652.

16—Hawkins v. State, 13 Ga. 322.

17—Com. v. Evans, 212 Pa. 369, 61 Atl. 989.

18—State v. Winter, 72 Iowa 627, 34 N. W. 475; State v. Brownlee, 84 Iowa 473, 51 N. W. 25.

In Illinois it has been held that only three peremptory challenges can be allowed in civil cases, no matter how many parties plaintiff or defendant. Gordon v. City of

civil cases; later on, however, it could be had on the trial of criminal cases less than a felony, upon a demand being made by either party in sufficient time before trial to obtain this jury.

To secure a struck jury, an application supported by an affidavit, must be made, setting forth such facts as will require the calling of such a jury.

Struck juries violate no constitutional right,[19] and do not contravene the constitutional requirement that the right of trial by jury shall remain inviolate.[20]

The manner of procedure consists, generally, in the selection by some competent impartial officer, of forty-eight names of the principal freeholders or electors from the list of such persons as are qualified for jury service, as returned to the clerk of court or jury commissioners, due notice being given so that the respective parties may be present at that time if they should so desire.

The number to be selected or struck, is of course, regulated by the various statutes of the states; however, it is generally held that a full panel of competent men must be had before proceeding to strike. In the absence of a party, the officers designated by statute or some other disinterested person may do the striking, and where there are several co-defendants or plaintiffs, they must join in the striking, being regarded as one party.

Manner of Striking. The usual manner for striking is for the parties alternately to strike a name from the list, until the prescribed number are stricken out, when the remainder is then made out, and certified to be the correct list of persons to be drawn as jurors by the order of court and duly delivered to the sheriff to be summoned.

The trial jury is formed or impaneled from the number thus summoned in the same manner as in the ordinary jury trial and subject to the same rights of challenge for cause.

Chicago, 201 Ill. 623, 66 N. E. 823; citing Schmidt v. Chicago & North-Western Ry. Co., 83 Ill. 405; Cadwallader v. Harris, 76 Ill. 370; Fagan v. City of Chicago, 84 Ill. 227.

By recent amendment five challenges allowed in Civil cases in Illinois: Laws of Illinois 1907.

In Michigan, Wisconsin and Texas statutes have been interpreted as to consider each defendant or group of defendants to be entitled to be a party entitled to the statutory number of challenges. Hundhausen v. Atkins, 36 Wis. 518.

19—Lommen v. Minn. Gas Light Co., 65 Minn. 196, 68 N. W. 53, 33 L. R. A. 437.

20—Fowler v. State, 58 N. J. Law 423, 34 Atl. 682.

Fraud or the deviation from the strict statutory method required to be pursued in the preparation of a list from which a struck jury obtained is considered a good ground for challenge to the array.[21]

To test their competency jurors may be examined on their *voir dire,* before striking again;[22] and as challenges for cause are thus allowed in the impanelment of a struck jury, it must necessarily follow, that talesmen may be summoned if required.

Under no condition, however, is a peremptory challenge allowed,[23] the reason being, that the right to strike, was in itself an equivalent thereto.

In the state of Iowa, in any civil action triable by jury, whenever both parties require it, a struck jury may be ordered, in which case eighteen jurors must be called into the box, and the parties commencing with the plaintiff must strike out one juror in turn until each has struck six, and the remaining six must try the case.[24]

§ 61. Method of Standing Objectionable Jurors Aside. The right of peremptory challenge under the common law was at one time taken away and a method of standing objectionable jurors aside to the end of the panel was devised in its place. This method seems to have been made use of by and for the benefit of the state alone, its purpose being to see if a choice could not be had out of the unobjectionable jurors.

This right of standing jurors aside still exists in some states and is not affected by an allowance of peremptory challenges. The state alone being allowed this right, as at common law, goes through the panel under this method and tenders the jurors who are not thus set aside, to the opposing party for challenge for cause.

We will not consider in this article any of the peculiar forms of juries that may have been in vogue at one time or another, such as, for instance, a jury called *"De mediatate linguae"* which was a jury allowed to aliens and composed half of citizens and half of foreigners. In one state of the union, this form of jury may still be allowed by the court.[25]

21—People v. Tweed, 50 How. Pr. N. Y. 262; Webb v. State, 29 O. State 351.

22—Howell v. Howell, 59 Ga. 145.

23—Eldredge v. Hubbell, 77 N. W. 631; Watson v. F. P. City R. R. Co., 42 Minn 46, 43 N. W. 904; Branch v. Dawson, 36 Minn. 193, 30 N. W. 545.

24—Code Iowa.

25—Gen. State Ky., 571, Sec. 6, 1879.

§ 62. Swearing in the Jury. A juror's oath completes the final act in the impaneling of the jury, "to well and truly try the issues joined and a true verdict render according to the law and the evidence" is the measure of his duty. The jury impaneled in each case must of course be sworn in that case to try that particular case, and not to try all cases that may be submitted to them.[26]

The better practice is to postpone the swearing in chief of the jurors until the full panel is obtained, so as to allow the longest possible time for peremptory challenges. The sound discretion of the court will govern as to the time and manner of so swearing them.[27]

The oath of a juror is of the utmost importance in a criminal case, and its omission would be sufficient to render the trial a nullity. An omission to swear the jury is held not to be necessarily fatal in a civil case, especially if not objected to.

We trust that these foregoing remarks based upon the best authority obtainable and covering a variety of points may be of some value to the busy practitioner in the important work of impaneling a trial jury.

26—Barney v. People, 22 Ill. 160. 27—Mathis v. State, 34 So. 287.

CHAPTER V.

PUBLICITY OF TRIAL AND PROCEEDINGS.

§ 63. Admission of Spectators. A trial should always be public in its nature, it is important in its effect upon the quality of evidence. On account of public scorn or the possibility of detection, witnesses are not so liable to falsify when their testimony is heard in open court by those who may be better informed or who upon the hearing thereof might proceed to inform themselves and in turn state their information to the parties so that the truth may be discovered. The very officers of court, the judges and counsel are directly influenced in their conduct by a public trial. They are more careful and considerate in their treatment of parties, more conscientious in the performance of their duty and aside from all of this a public trial is an educational factor in itself.

Sir William Blackstone says:—

"This open examination of the witness, *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth than the private and secret examination taken down before an officer or his clerk, as in the ecclesiastical courts and in all others that have borrowed their practice from the civil law; where a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal."[1]

The publicity of examination serves the useful purpose of keeping a witness keyed up to a sense of his duty and causes his testimony to be more correct than it might otherwise be

1—Blackstone Com., Book 3, p. 373.

and as Mr. Jeremy Bentham says in his book entitled *Rationale of Judicial Evidence:* "Environed as he sees himself by a thousand eyes, contradiction, should he hazard a false tale, will seem ready to rise up in opposition to it from a thousand mouths. Many a known face, and every unknown countenance, presents to him a possible source of detection, and from whence the truth he is struggling to suppress may through some unexpected channel burst forth to his confusion."[2]

A right of public trial in a criminal case is absolute, but the judge has a discretion in regulating this, and may exclude spectators that abuse their privilege or hinder the trial by their conduct. There are other reasons for exclusion of equal value, such as matters of public policy, lack of room, the taking of testimony of an indecent nature and injurious to public morals.[3]

The court may even prevent the publication of its proceedings by contempt, in proper instances as when these proceedings are *ex parte* or when their publication might prejudicially excite public sentiment.

§ 64. **Exclusion of Witnesses. General Observations.** It is often desirable and proper that witnesses should be examined out of the hearing of each other as it tends to prevent an agreement or combination among the witnesses to tell the same story.[4]

Whenever it is desired by either party that the witnesses be examined out of the hearing of each other, the court has the power to enter an order excluding them from the court room during the trial. This cannot perhaps be demanded by the parties as a matter of right but it is seldom refused by the court when requested.[5] The court has power to exclude witnesses from the court room on its own motion whenever deemed essential to the discovery of truth.[6] It has been held that it might be granted even at the request of the jury.[7]

This practice was in great vogue among the English courts, especially as it was claimed to have its sanction from the Bible itself. Daniel is said to have used this method in the discovery of truth.

2—Bentham, Rationale of Judicial Evidence, Vol. II, C. X, No. 2.

3—Dunham v. State, 6 Ia. 245.

4—Hubbel v. Ream, 31 Ia. 289.

5—*Supra.*

6—King v. Hanson, 99 N. W. 1091.

7—Wilson v. State, 52 Ala. 299; Ryan v. Couch, 66 Ala. 244.

§ 65. Exclusion Prevents Combinations Among Witnesses and Alteration of Testimony. It tends to prevent an agreement or combination among witnesses to tell the same story, and to prevent witnesses who are interested and biased from preparing themselves to meet statements made upon the stand by other witnesses. It compells the witnesses to rely upon their own memory, and where they hear no testimony on the case their own testimony is neither warped nor influenced thereby.[7a]

Witnesses when put under this rule are prevented from either strengthening or altering their testimony according to their bias, and the courts have held that it is proper and legitimate in argument to comment upon the fairness or truthfulness of the witness by calling the attention of the jury to the fact that the witness has had opportunity, from remaining in the court room and hearing the testimony of other witnesses, to modify his own testimony or to change or strengthen it as he may be inclined to do.[8]

Not only a biased witness, but the most fair and honest witness may be influenced by hearing the testimony given by others on the trial. He comes to believe that his own memory was possibly at fault and that the statements made by others may be more nearly the truth and thereby is influenced to state what he might not otherwise.[9] The less a witness hears of the testimony of another the more likely he is to testify fairly and unbiased.[10]

§ 66. Exclusion Not Granted as a Matter of Right. As already stated the exclusion of witnesses cannot be demanded as a matter of right.[11] It is granted only as a matter of favor by the court. In Tennessee it is given as a matter of right in all cases when an affidavit is made showing a necessity for it. There must be an affidavit presented in all cases alleging facts which show the necessity for it, but it is usually held to be a matter of sound judicial discretion whether or not the court will grant the order.[12] "If it is deemed necessary in

7a—Wisener v. Maupin, 2 Baxt. 343.

8—Louisville R. Co. v. York, 128 Ala. 305; 30 So. 676.

9—Meeks v. State, 51 Ga. 429; Shaw v. State, 102 Ga. 660, 29 S. E. 477; Salisbury v. Com., 79 Ky. 425.

10—State v. Zellers, 7 N. J. L. 226.

11—Hubbel v. Ream, 31 Ia. 289; King v. Hanson, 99 N. W. 1091.

12—McLean v. State, 16 Ala. 672; McClellan v. State, 117 Ala. 140, 23 So. 653; People v. McCarty, 117 Cal. 65, 48 Pac. 984; Eriss-

order to elicit truth and prompt justice, all witnesses but the one under examination may be ordered to leave the room, and when requested by either party it is rarely withheld."[13]

In the state of Texas the court held it to be a good ground for reversal to refuse the application of either party to exclude the witnesses when requested.[14]

§ 67. Persons Exempted from the Order of Exclusion. From the rule excluding witnesses the following persons are usually exempt: the parties to the case and their attorneys, expert witnesses, medical witnesses and witnesses to character. As to whether medical experts should be exempted from the operation of this rule is questionable, as such witnesses are supposed to testify from hypothetical questions without considering their own personal knowledge or conclusions based on the evidence which they may hear.[15] The agents of a party who have such a grasp of the facts that he is of considerable assistance to the party who is his principal should not be excluded, although he is a witness in the case. Court officers are of course exempt from the rule whether witnesses or not. In some jurisdictions a party is not exempted from the operation of the rule unless he first testified in the case.[15a]

It is held as a strict rule of practice in the state of New Jersey that a prisoner's witnesses should not be in the court room while the state's witnesses are being examined.[16]

§ 68. Punishment for the Violation of Rule by Witnesses. Connivance. When the names of witnesses are given to the sheriff to be excluded, they are read in court by the clerk, or the witnesses may be simply directed by the court in general to withdraw without reading the names. It may be noticed that the exclusion is only in force during the taking of testimony. If a witness remains in violation of this order it is not proper to deprive a party of his testimony by excluding him altogether. To do this might be to deny a party of the only person in the world by whom the defendant could

man v. Erissman, 25 Ill. 119; Porter v. State, 2 Ind. 435; Hubbel v. Ream, 31 Ia. 239; State v. Davis, 110 Ia. 746, 82 N. W. 328; Commonwealth v. Follansbee, 155 Mass. 274, 29 N. E. 471; Johnston v. Ins. Co., 106 Mich. 96, 64 N. W. 5. 29 L. R. A. 63.

13—1 Gr. Evidence, 432.

14—Watts v. Holland, 56 Tex. 54.

15—Johnson v. State, 10 Tex. 571, 60 Am. Dec. 223. (Medical experts were excluded.)

15a—French v. Sale, 63 Miss. 386, 391.

16—State v. Zellers, 7 N. J. L 220.

prove his innocence.[17] Such a witness remaining in violation of the order of exclusion may be punished for contempt and a comment may be made on his evidence on account of his remaining in violation of the rule.[18]

It is held to be no valid objection to a witness called by the state, when he was in the court room and heard the testimony of other witnesses when his presence was not contrary to any order of court, and even if he remained in court contrary to such an order that would not disqualify him as a witness on the case,[19] However, if a witness should remain contrary to the rule of court excluding all witnesses through the connivance or fault of the party to the suit the witness may be kept from testifying in the case at all.[20]

But, in the absence of any collusion, connivance or fraud, a party should not be held accountable for the conduct of his witnesses in obeying this rule. A fine of a party who is guilty in aiding witnesses to violate the rule would not be adequate punishment. The fine of the witness himself would not cure it, but the loss of testimony of the witness is not too severe and even in that case the party loses only a witness that would testify falsely even as he falsely disobeyed the order of the court.

It would seem to be difficult, if not impossible, to establish any general rule regarding the exclusion of witnesses that would be fair in every instance to the parties concerned. A party cannot be held to account for every movement of his witness during the confusion of the trial and especially so as a party has in reality very little, if any, control over his witnesses at all.[21]

§ 69. **Limitation of Number of Witnesses.** Witnesses that testify only to a certain identical point in the evidence may be limited by the court in its discretion. If this were not so a party could pass the census return over to the summoning officer and have the whole population produced in court as witnesses. This might be done especially in the matter of character evidence in a locality where the party is well known.

Nothing is so well settled as that mere numbers do not mean the greater weight of evidence. The case is not to be deter-

17—Rooks v. State, 65 Ga. 330.

18—Grimmes v. Martin, 10 Iowa 347.

19—Kota v. People, 136 Ill. 655, 27 N. E. 53.

20—Keith v. Wilson, 6 Mo. 435, (441), 35 Am. Dec. 443.

21—Laughlin v. State, 18 Ohio 99, 102, 51 Am. Dec. 444.

mined by an imposing array of witnesses to the expense and ruin of the parties.

If however one of the alloted number selected by a party should prove incompetent the party should then be allowed to substitute another.

Impeaching Witnesses. A limitation is also imposed on the witnesses impeaching the impeaching witnesses. It is held that no further than this can a party properly go for the reason that impeaching witnesses might in turn go on in *ad finitum* making an endless impeachment. In some states the limitation is only as far as witnesses impeaching the impeaching witnesses and no further.[22] In Illinois an impeaching witness cannot be impeached.[23]

Evidence may also be excluded on the ground of the undue confusion which may arise therefrom, produced by diverting the attention of the jury from the real issue and fixing it upon minor and trivial matters and by making the issue so intricate and intangled that the evidence suppresses the truth.

Expert Witnesses. It is usual to limit expert witnesses in number fixed at from two to five on a side. With wealth and means on hand it would not be difficult to secure an imposing array of experts to testify. Much more by far depends upon the capacity and skill of the experts than upon their numbers and justice is well served by a wise limitation on the number of experts which the parties may call.

22—State v. Brant, 14 Iowa 182; State v. Moore, 25 Iowa 137; Brink v. Stratton, 63 N. E. 148 (N. Y.).

23—Rector v. Rector, 8 Ill. 105.

CHAPTER VI.

OPENING STATEMENTS.

§ 70. Right of Parties to Make a Statement. The first duty that the parties or their counsel have in the trial of a case is to present in an opening statement to the jury a clear and full idea of the matters in dispute and what the evidence will show in relation thereto so as to prepare the minds of the jury to receive and properly assimilate the evidence to be produced. The opening statement should be full enough to make the case understood and should be confined to the proposed proof upon which the party relies to substantiate his claim. The question arises sometimes concerning the right of the parties to present to the jury the first statement. The only sound rule seems to be that if the plaintiff has any evidence to give in order to be entitled to a verdict, he has the right to make the opening statement and produce his evidence first. In other words the test may be stated to be, that the party against whom judgment would go if no evidence were given, has the right to make the opening statement and to begin the case. The one having the burden of proof is entitled to open and close whether he is defendant or plaintiff.[1]

1—Cassell v. First Nat. Bank, 169 Ill. 380, 48 N. E. 701. The party holding the affirmative has the right to open and close. Goetz v. Sona, 65 Ill. App. 78.

If the plaintiff has anything to prove in order to have a verdict the right to open the case is said to belong to him,[2] or if he must give any evidence at all in order to be entitled to a verdict for his claim.[3]

§ 71. Same Subject, Continued. A defendant may make the opening statement where his pleading admits clearly and unqualifiedly every material allegation of plaintiff's pleading.[4] This admission of the essential and material facts in the plaintiff's pleading may be made by the defendant by means of an oral or written admission on the trial or by amending his pleading, so as to entitle him to open the case.

It is the usual practice for the plaintiff or the party on whom rests the burden of proof to state first his claim and the evidence by which he expects to sustain it; after which the other party may state his defense and the evidence he expects to offer in support. After all of which the party upon whom rests the burden of proof should introduce his evidence in chief.[5]

2—Cortelyou v. Hiatt, 36 Neb. 584, 54 N. W. 964.

3—Johnson v. Josephs, 75 Maine 544; Dille v. Lovell, 37 Ohio 415.

4—Shulse v. McWilliams, 104 Ind. 512, 3 N. E. 243.

5—In Cleveland & E. Electric R. Co. v. Hawkins, 64 Ohio Sup. 391, 60 N. E. 558, the court said that "since its amendment, March 3, 1892 (89 Ohio Laws, p. 59), the section reads as follows: When the jury is sworn the trial shall proceed, except as provided in the next section, in the following order, unless the court for special reasons otherwise direct: (1) The plaintiff must briefly state his claim and may briefly state the evidence by which he expects to sustain it. (2) The defendant must then briefly state his defence, and may briefly state the evidence he expects to offer in support of it. (3) The party who would be defeated, if no evidence were offered on either side, must first produce his evidence, and the adverse party must then produce his evidence. (4) The parties shall then be confined to rebutting evidence, unless the court, for good reasons in the furtherance of justice, permit them to offer evidence in their original case. (5) When the evidence is concluded, either party may present written instructions to the court on matters of law, and request the same to be given to the jury, which instructions shall be given or refused by the court before the argument to the jury is commenced. (6) The parties may then submit or argue the case before the jury; the party required first to produce his evidence shall have the opening and closing argument, and if several defendants, having separate defenses, appear by different counsel, the court

In some jurisdictions the opening statement of the defendant should not be made usually until the evidence of the plaintiff has been heard and the plaintiff has rested his case, although it is not uncommon even in such states for the defendant to open his case before the plaintiff introduces his evidence.[6]

The right to open the case to the jury is a fixed right, at least in all cases for unliquidated damages,[7] and a refusal of this right is error to which an exception will lie.

A distinction must be made between the provisions of the various statutes of the States providing who should open the case to the jury and those provisions relating to the opening and closing argument of the case to the jury.

§ 72. Order of Statements in Discretion of the Court. Criminal Cases. It is within the sound discretion of a trial court to fix the time at which the opening statement to the jury is to be made and in the absence of clear abuse of this discretion the appellate court would not consider it as error.[8]

It is within the discretion of the court to refuse the defendant's request to make his opening statement at the close of plaintiff's evidence although the making of such a statement disclosed to the plaintiff an error in his declaration and caused him to amend the pleading.[9]

The burden of proof always rests upon the State in a criminal case on account of the presumption of innocence on the part of the defendant and for that reason the prosecutor has the right to open the case and to state all competent facts which he intends to prove and no others.

Even where the defense is insanity and the homicide is not controverted, the prosecution has been held to have the right to open and close.[10] The opening statement may be made by

shall arrange their relative order. (7) The court, after the argument is concluded, shall, before proceeding with other business, charge the jury; any charge shall be reduced to writing by the court, if either party, before the argument to the jury is commenced, request it."

6—Hettinger v. Beiler, 54 Ill. App. 320, but see Sands v. Potter, 59 Ill. App. 206, which seems to hold that both parties may be required to open before evidence is put in.

7—Hettinger v. Beiler, 54 Ill. App. 320.

8—Hettinger v. Beiler, 54 Ill. App. 320.

9—D. Sinclair Co. v. Waddill, 99 Ill. App. 334. Judgment affirmed 65 N. E. 437, 200 Ill. 17.

10—State v. Felter, 32 Iowa 49.

an attorney acting as an assistant to the State's Attorney without any impropriety on that account.[11]

§ 73. Importance of a Statement. Too much importance cannot be attached to the proper making of the opening statement. In fact it is of as much relative importance to inform the jury on the matters in controversy so that they may understand the materiality and relevancy of the evidence produced and be able to retain a strong recollection thereof, as it is for counsel afterwards to accentuate the evidence and explain it in his closing argument to the jury.

The opening statement has the same relation to the closing argument as the upper mill stone has to the lower. The jury would grasp the evidence quicker, would understand and digest it better and would follow the argument of counsel more readily if proper attention were paid to a clear setting forth of the issues in an opening statement.

It is equally as bad to make a statement to the jury that is lacking in completeness as to make a statement too far reaching in its extent. Of these the latter would be more disastrous in its effects to the party himself, for a jury is very prone to demand that the assurances and promises held out by counsel should be met. It is not always the better policy to put one's best foot forward at the beginning, and although there is little room for a display of modesty on the part of one with serious responsibilities commanding his attention, yet the effect is not to be ignored where the strength of evidence later brought to light on a trial far exceeds the expectation of the jury.

A lack of a full statement of the issues in the case on the part of one of the parties cannot be called error,[12] but where the plaintiff's opening statement discloses no cause of action, it is frequently the practice to order a nonsuit at once where the court has that power. This is substantially in effect the same as though a demurrer had been made to the evidence, or as if a peremptory instruction was made by the defendant at the close of plaintiff's case to direct a verdict. All the facts and offers of proof should be taken into consideration in passing upon this motion together with the matters stated in the party's pleadings.[13]

11—Roberts v. Comm., 94 Ky. 499, 22 S. W. 845.

12—Clarke v. O'Rourke, 111 Mich. 108, 69 N. W. 147.

13—Clews v. Bank, 105 N. Y. 398, 11 N. E. 814.

Such a case as the one just referred to can scarcely arise except where the cause of action stated in the pleading was in itself subject to demurrer, but was not taken advantage of before the opening of the case.

§ 74. Competent Matters in the Opening Statement. The statement relates to the intended evidence merely and should not be made an avenue to put incompetent matters before the jury even though it is nothing more than an offer to prove such facts. It should not be made a cover for the introduction of details of evidence which cannot legally be produced on the trial. A strict application of the rules of evidence should not be applied, however, to the matters set forth in the opening statement.[14] Where there is nothing either in law or in the pleadings which would put the court or the opposing party in possession of the fact that the party had no such evidence which could be used in support of the statement made on the opening, there is no way, it seems, by which a party could object or by exception protect himself from such statements. In such a case the court should instruct the jury to disregard all such statements as may have been made by counsel in their opening statement which are unsupported by the evidence.

A party is not confined to the facts recited in his opening statement and for this reason the court properly refused a requested instruction that the plaintiff was bound by any statement made by his counsel in his opening statement to the jury.[15] For this reason it is error to admit evidence to discredit a statement made by counsel to the jury in stating what he expects to prove where no attempt has been made to prove it.[16]

In opening the case it has been held proper for a prosecuting attorney to state that the defendant made a forcible resistance to the officers when making his arrest when he expects to prove this fact by proper evidence,[17] and indeed all matters relied upon by the prosecution for a conviction which are competent may be stated on the opening even if afterwards

14—Campbell v. Kalamazoo, 80 Mich. 655, 45 N. W. 652.

15—Lusk v. Throop, 189 Ill. 127, 59 N. E. 529.

16—Howard v. Ill. Trust & Savings Bank, 189 Ill. 568, 59 N. E. 1106.

17—People v. Chalmers, 5 Utah 201, 14 Pac. 131, 5 Utah 274, 15 Pac. 2.

these matters are not put in evidence as counsel honestly intended, but was prevented by unforeseen circumstances.[18]

§ 75. Improper Matters in Opening Statement. An opening statement should certainly never contain matter which is clearly incompetent when offered as evidence,[19] and where a client was not allowed to testify in the case, his counsel for this reason would not be permitted to give in his opening statement such facts as this party alone can testify to and of which he was the only witness.[20]

A party is not bound to substantiate every statement made in his opening statement to the jury and to produce evidence in support thereof, nor is he confined to the introduction of evidence to the statements of what he expects to prove,[21] since this would subject him at his peril to announce to the jury each and every item of evidence intended to be used.[22]

It is the duty of the trial court to prohibit any statement on the part of counsel of matters foreign to the issues or tending to excite the prejudice of the jury;[23] to reprove counsel who overstep due bounds in their opening statements and to reprove them in the hearing of the jury and afterwards to admonish the jury in the instructions to dismiss such statements from their mind. Even such action of the court may not be sufficient to cure a serious infraction of this rule and a reversal will be given on that account on appeal.[24] Overstepping of the bounds and just limits of an opening statement are not usually considered of grave importance unless it is done in bad faith and concerns matters that would necessarily prejudice the jury, and is of such a nature that the court is unable to remove the prejudice by anything it may say or do.[25]

§ 76. Reading the Pleadings to the Jury. In making the statement of the case to the jury it is usual, although not necessary, to read the pleadings. Counsel may be required

18—People v. Ellsworth, 92 Cal. 594, 28 Pac. 604; People v. Gleason, 127 Cal. 323, 59 Pac. 592; State v. Crafton, 89 Iowa 107, 56 N. W. 257.

19—Warn v. City of Flint, 140 Mich. 573, 104 N. W. 37.

20—Scripps v. Reilly, 35 Mich. 371, 24 Am. Rep. 575.

21—Kelly v. Troy Ins. Co., 3 Wis. 229, 60 Am. Dec. 379.

22—Lusk v. Throop, 189 Ill. 127, 59 N. E. 529.

23—Hennies v. Vogel, 87 Ill. 242.

24—Scripps v. Reilly, 35 Mich. 371.

25—Prentess v. Bates, 93 Mich. 235, 53 N. W. 153, 17 L. R. A. 494, n; Lee v. Campbell, 77 Wis. 340 and 46 N. W. 497.

to read them or to state their contents in order to enable the issues to be understood. It is, however, a matter of discretion with the trial judge whether he will allow the pleadings to be read to the jury or not. There can be no real objection to allowing them to be read as a part of the opening statement or at least allowing such parts to be read as have not been stricken out on motion, for the reason that it would be not less prejudicial to state orally the same matters before the jury as counsel undoubtedly has a right to do. Certainly no objection could be urged against the reading of the opposite party's pleading to the jury as containing the facts relied upon by such party. The practice however is not uniform as it has been held that pleadings are considered as for the court alone, to enable court to understand the issues involved and to rule on the competency and materiality of the evidence which is offered.[26] Where the pleadings contain improper matter, they should not be allowed to be read any more than counsel may orally state improper matter to the jury in his opening statement.

§ 77. Reading of Papers Proposed to Be Introduced. While the opening statement should be complete enough to state clearly the matters at issue between the parties, yet a relation by the counsel of the expected oral testimony in detail and at length or a reading by him of expected documentary proofs at large should not be tolerated. There may be cases where the statement of evidence or reading of papers may be allowed as convenient or harmless under the discretion of the court, but this is extremely exceptional and of doubtful propriety.

An opening statement should not embrace the reading of documents or maps, proposed to be offered in evidence except as the court may in its discretion permit it.[27]

§ 78. Reading of Law in Opening Statement. In order to give the jury a clear idea of the case and the relation of the evidence thereto it may be necessary for counsel to state in good faith to the jury the law bearing on the case. The courts hold as a general rule that counsel should not be permitted to read law to the jury in civil actions and that it would be an error of the court to permit this.[28]

26—Hachman v. Maguire, 20 Mo. App. 286.

27—Hill v. Watkins, 28 N. Y. Supp. 805.

28—Bangs v. State, 61 Miss. 363; Griffen v. Lewiston, 55 Pac. 545 (Idaho); Prentiss v. Bates, 92 Mich. 234, 53 N. W. 153; City

It would seem that there is really no difference between the oral statement of law to a jury or the reading of it from the printed reports or books and if either method is allowed, it would certainly be better to allow the reading. Yet it is held that the reading of extracts from law books to the jury during the opening statement is not permissible except in criminal cases and in civil cases where the jury is constituted the judge of both law and fact.[29]

Where the reading of law to the jury is permitted either on the opening statement or in the argument, the reason for its permission being the same in both instances and governed by the same rule, it should be supervised by the court and all law not pertinent to the case should be excluded.[30] Where the reading is from the reported decisions of the Supreme Court such reading should not be restricted to portions containing mere legal principles, but the recital of facts and the reasoning of the court necessary to an understanding of the principles should be permitted.[31]

The jury have no right to take the statement of any attorney as to what the law is except where the court gives an instruction coincident with it and to the same general effect.[32] Where the plaintiff's attorney did not encroach on the province of the court to state finally the law to the jury, although in stating the case to the jury he made a statement of what he claimed was the law of the case as a basis for argument on the facts, the court considered such conduct as not prejudicial to any right of the defendant.[33]

§ 79. **Exceptions Taken to Improper Remarks.** An exception may be taken to the remarks of counsel, or the ruling of the court in permitting counsel to go beyond the proper limits in his opening statement, and such exception should be saved if the remarks made would probably result in prejudice to

of Chicago v. McGivin, 78 Ill. 347; Nash v. Burns, 35 Ill. App. 296; State v. Whitman, 53 Kan. 343, 42 Am. St. 288; Fosdick v. Van Arsdale, 74 Mich. 302, 41 N. W. 931. See also Askew v. State, 94 Ala. 4, 3 Am. St. 83.

29—Wohlford v. People, 45 Ill. App. 188, 148 Ill. 296, 36 N. E. 107; Griffen v. Lewiston, 55 Pac. 545.

30—Strohm v. People, 60 Ill. App. 128.

31—Wohlford v. People, *supra.*

32—Vocke v. City of Chicago, 208 Ill. 192, 70 N. E. 325.

33—Coyne v. Avery, 59 N. E. 788, 189 Ill. 378; Griffen v. Lewiston, *supra;* Prentiss v. Bates, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494 n.; Fosdick v. Van Arsdale, 74 Mich. 302, 41 N. W. 931.

the party.[34] If no injury results to the party therefrom, it would be of no material consequence and an exception would not lie.[35]

Where improper remarks have been made and objected to and the ruling of the court properly excepted to, if adverse, and such conduct is allowed to continue without any attempt on the part of the court to correct the impression made by it, an instruction should then be asked for remedying this matter as far as possible and removing it from the consideration and mind of the jury.

§ 80. Improper Remarks Cured by Withdrawal or Instruction. An immediate withdrawal of the improper remarks made by counsel is usually sufficient to cure the error, but it is not necessary that such a withdrawal should include the statement that such remarks are untrue.[36]

An instruction to the jury to dismiss from their mind the improper statements made and the withdrawal of such statements by the offending counsel coupled with a severe rebuke by the court may be ordinarily sufficient to cure the error committed, but in a gross case of abuse this would not be sufficient and, as Judge Graves said, "It is quite impossible to conclude that the jury had not been influenced too far by the erroneous rulings and proceedings, to be brought into the same impartial attitude by the court's admonition, which they would have held if counsel for the defendant in error had been properly confined in his opening statement. The course of fair and settled practice was violated to the prejudice of plaintiff in error, and it is not a satisfactory answer to say that the court went as far as practicable afterwards to cure the mischief, so long as an inference remained that the remedy applied by the court was not adequate.[37]

§ 81. Anticipating Defense of Opponent. As a party may properly be allowed to give evidence to rebut matter which the opponent intends to rely upon when he gives his evidence on the trial[38] so it is proper in some jurisdictions at least to

34—Ayrcault v. Chamberland, 33 Barb. 229; Scripps v. Reilly, 38 Mich. 10; Bendetson v. Moody, 100 Mich. 553, 59 N. W. 252.

35—Ins. Co. v. Weeks, 45 Kan. 751, 26 Pac. 410.

36—Erb v. German-Am. Ins. Co., 98 Iowa 606, 67 N. W. 583, 40 L. R. A. 845 n.; Welch v. Palmer, 836 Mich. 552, 48 N. W. 252.

37—Scripps v. Reilly, 35 Mich. 371, 391.

38—Hintz v. Graupner, 138 Ill. 158, 27 N. E. 935.

state in a general way the defense relied upon by the opponent and how he expects to meet it. This is held in great disfavor by most courts and is limited if allowed at all, to a very brief statement. It is by no means good practice and had better be avoided except in cases where it is impossible to separate properly the matters in dispute or where it would be good policy to "steal the thunder" of the defendant before he had sufficient opportunity to use it effectively.[39]

Under the old English practice it was a usual thing to anticipate in an opening statement the defense of the opposing party.

§ 82. Waiver of Statement. A refusal to make an opening statement would seem to result merely in a waiver of this right and privilege, although in at least one instance it has been held sufficient to entitle the opposite party to a verdict upon a motion therefor.[40]

39—Ayrcault v. Chamberland, 33 Barb. (N. Y.) 229; Baker v. State, 69 Wis. 32, 33 N. W. 52.

40—Osborne v. Kline, 18 Neb. 344, 25 N. W. 360.

CHAPTER VII.

POWERS AND DUTIES OF THE COURT DURING TRIAL.

§ 83. Presence of Judge Required at the Trial. There is no court in the true sense without a judge present; his presence is always essential.[1] The presence of the judge in a criminal case and, especially, in one involving a felony is of the utmost importance, and he must be, if not actually present in the court room during all of the trial, at least constructively present, so he can be in readiness to assert authority and assume instant control.[2]

It is not uncommon, although not desirable, for the court to be absent during the progress of the argument or when the business of the court reasonably requires it, and unless prejudice results on this account, there will be no error sufficient to warrant a reversal of the case.[3] It would seem that

1—State v. Carnagy, 106 Iowa 487, 76 N. W. 805.
2—State v. Carnagy, *supra.*
3—Baxter v. Ray, 62 Iowa 336, 17 N. W. 576.

the court should be extremely careful in the matter of absenting himself even during the argument, as this is as much a part of the trial as the hearing of evidence or any of the proceedings.[4] The presence of the judge preserves the legal solemnity and the security of the trial and upholds the majesty of the law.[5] In civil cases it seems that consent to absence of the judge may be given or implied by not objecting in advance when the court leaves the room; but in the trial of a felony, such a consent cannot be given, or, if given, is not binding in any sense.[6]

Even where the absence of the judge is permissible within discretionary limits, it will be error of sufficient gravity to warrant reversal where such absence is for a considerable length of time.[7] In any event, whether the judge properly or improperly absents himself, no reversal can follow where a showing is made that no prejudice resulted from such action.[8] However, the practice of the judge absenting himself is full of risk; it imposes on counsel obligations of scrupulous observation of professional propriety such that its disregard would incur hazard of reversal if a party has profited thereby.[9] The parties in a civil case and, especially, the defendants in criminal cases, are entitled to the presence of the court at all stages of the trial and to have every act of the judge or the jury transpire in their presence so that they may know and judge of the effect it has upon the case. Absence during a portion of the trial in a civil case is undesirable no matter how good a reason there may be for it, but such absence will not constitute error sufficient to reverse judgment unless prejudice resulted therefrom or some error transpired during and on account of such absence.[10]

§ 84. Judicial Functions Cannot Be Delegated. Judicial functions must be performed by the persons designated and not by their agents. For this reason a judge cannot call an attorney to preside during a part of the trial, and to do so would be error.[11] It was held in a Missouri case that it is

4—Smith v. Sherwood, 95 Wis. 558, 70 N. W. 682.

5—Hayes v. State, 58 Ga. 35; Pritchett v. State, 92 Ga. 65, 18 S. E. 536.

6—Turberville v. State, 56 Miss. 793.

7—Smith v. Sherwood, *supra.*

8—State v. Carnagy, *supra.*

9—Hall v. Wolf, 61 Iowa 559, 16 N. W. 710.

10—Baxter v. Ray, 62 Iowa 336; 19 N. W. 576; Hall v. Wolf, *supra.*

11—Davis v. Wilson, 65 Ill. 527.

error for the court to leave the room during the trial in any case, and it is so even where an attorney is left in charge.[12] Another judge, it has been held, cannot be substituted by the trial judge before the conclusion of the case, and to do so, would be ground for a new trial.[13]

§ 84a. **Temporary Absence During Argument.** The presence of the judge at the trial of a case is required at all stages of its proceedings, but a mere temporary absence from the bench, where no prejudice resulted therefrom, would not be sufficient to remand the case for a new trial.[14] A mere temporary absence of the judge from the court room during argument is not reversible error in the absence of prejudice.[15]

The absence of a judge is improper, whether in a civil case involving mere property rights or in a criminal trial, but more especially in the latter.[16] An accused on trial for a serious criminal offense punishable by incarceration in the penitentiary has an undoubted right to the presence of the judge during argument of the case to the jury,[17] and although the judge is within hearing, but absent from the room, and in a position to pass on any question that might arise, it has been held improper conduct.[18] For a judge to leave the bench during trial of a capital case has been held improper, unless all business was suspended until his return.[19] To constitute error, according to the Supreme Court of Mississippi, there must be such relinquishment of the functions of office by reason of bodily absence as to prevent instant assertion of authority by the judge when occasion calls for it.[20]

§ 85. **Judge Falling Asleep During the Trial.** It would seem to be misconduct upon the part of the respective attorneys en-

12—Nichols v. Metzger, 43 Mo. App. 607; Colburn v. Brummel, 49 Mo. App. 445.

13—Durden v. People, 192 Ill. 497, 61 N. E. 317, 55 L. R. A. 240.

14—R. Co. v. Anderson, 193 Ill. 13, 61 N. E. 999.

In Schintz v. People, 178 Ill. 320, 52 N. E. 903, held that it is not error for the judge to go to an adjacent room, within hearing, and remain there during the argument for the defense. The following cases hold to the same effect: State v. Benerman, 59 Kan. 586, 53 Pac. 874; Thompson v. People, 144 Ill. 378, 32 N. E. 968; State v. Smith, 49 Conn. 378; O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269.

15—Allen v. Ames College, 106 Iowa 602, 76 N. W. 848.

16—Meredith v. People, 84 Ill. 479.

17—Thompson v. People, *supra.*

18—Schintz v. People, *supra.*

19—Hayes v. State, 58 Ga. 35.

20—Turberville v. State, 56 Miss. 793.

gaged in the case, rather than any misconduct chargeable to the court, that during the conduct of the trial the judge should fall asleep while witnesses are being examined. The Supreme Court of Illinois has held that where no prejudice resulted it would not be good ground for a new trial.[21] There is really no difference between the fact of a judge being asleep during a trial or a portion thereof and his bodily absence from the court room, and for this reason this ruling would seem in accord with good reasoning.

§ 86. Powers and Duties of Presiding Judge. The relation of the judge to the proceeding and trial briefly stated are: To pass upon all questions of law that may arise, and to do so as soon as possible, although his decision may be reserved for a limited time for the purpose of informing himself on the law, or for submission of briefs upon the point by counsel.[22] Be present and preserve proper order (this is more important in criminal cases than in civil). Prevent intimidation of witnesses or other improper conduct toward them by counsel.[23] Compel proper conduct towards the court, and punish infractions by fine or sentence for contempt. Prescribe regulations in the proper discharge of court business and control times of the sittings of court and adjournments.[24] Regulate the order of introducing evidence in the exercise of sound discretion.

To supervise the conduct of witnesses and direct them as to conduct.[25] Supervise conduct of the jury and do all things to preserve impartiality and freedom from prejudice and bias. The court may within its discretion limit the number of witnesses on a single point, as well as regulate the order of their introduction.[26] This limitation may be imposed at any stage of the trial and need not be made known at the beginning.

Witnesses as to credibility come within the above rule and may be limited in number.[27] Witnesses as to value of land

21—R. Co. v. Anderson, 193 Ill. 12.

22—McCauley v. Weller, 12 Cal. 500.

23—Crow v. Peters, 63 Mo. 429.

24—Wartena v. State, 105 Ind. 445, 5 N. E. 20; Jones v. Spear, 22 Vt. 426.

25—Ferguson v. Hirsch, 54 Ind. 337.

26—Green v. Phoenix Mut. Life Co., 134 Ill. 310, 25 N. E. 583, 10 L. R. A. 576; Minthon v. Lewis, 78 Iowa 620, 43 N. W. 465; Bays v. Hunt, 60 Iowa 251, 14 N. W. 785; Detroit City Ry. v. Mills, 85 Mich. 654, 48 N. W. 1007.

27—Bays v. Hunt, 60 Iowa 251, 14 N. W. 785.

may also be limited.[28] In Illinois, however, the court has refused to limit the number of witnesses in relation to the value of land.[29] Witnesses as to character or impeachment of witnesses may also be limited in number.[30] It is held proper to limit the number of expert witnesses.[31]

Court should assign counsel to the parties, if they have none, especially in criminal cases, and advise the defendant of his rights in this respect, and may also limit number of acting attorneys on each side. The court may caution a witness in a proper manner when hesitating or embarrassed, and also where a question is propounded that would tend to incriminate him.[32] The witness may be cautioned by the court to testify only in regard to matters of his own personal knowledge;[33] but the court need not caution the parties while testifying unless it be to prevent them from volunteering testimony.[34]

§ 87. Same Subject, Continued. The judge may ask leading questions of a witness, even on the trial of a criminal case. The court has a duty to develop truth without partiality, and may examine a witness as his discretion dictates, although this practice should be discouraged.[35] Such questions have, however, been repeatedly held proper.[36] Questions propounded by the court are subject to the same legal objection as any questions of counsel.[37] It would be difficult and perhaps tainted with a shade of discourtesy to interrupt a judge by interposing objections, and although objections should be made in all cases before the answer is given, it seems that the Courts of Appeal are inclined more readily to strike out testimony where improper questions were asked by the court and the objection came late if at all.

The court has a right in civil cases to order a party to testify in a case first before producing his witnesses, and on his re-

28—Riggs v. Sterling, 60 Mich. 643, 27 N. W. 705.

29—White v. Herman, 51 Ill. 243.

30—Williams v. McKee, 98 Tenn. 139, 38 S. W. 730.

31—Mergentheim v. State, 107 Ind. 567, 8 N. E. 568.

32—Friess v. N. Y. Cent. Ry. Co., 67 Hun. 205.

33—Com. v. Certain Intoxicating Liquors, 132 Mass. 36.

34—Dunn v. State, 99 Ga. 211, 25 S. E. 448.

35—Fager v. State, 22 Neb. 332, 35 N. W. 195.

36—Hauffman v. Cauble, 86 Ind. 591; Sessions v. Rice, 70 Iowa 306, 30 N. W. 735; State v. Marshall, 105 Iowa 42, 74 N. W. 763.

37—People v. Lacoste, 37 N. Y. 196; Sparks v. State, 59 Ala. 82.

fusal may exclude him. It is error for the court to speak either too favorably to a witness or on the other hand, so harshly, as to prejudice the jury, and it is improper to conduct himself towards any witness in such manner as to leave an impression upon the jury as to the court's opinion of his credibility.

The court should not use offensive language to counsel, so as to prejudice him before the jury,[37a] and where a judge in passing on evidence criticised the conduct of the counsel for proposing such evidence it was held error.[38] So also a refusal of the court to hear counsel when they were endeavoring courteously to explain their motions or requests.[39] A reflection by the court on the ability or capacity or memory of counsel is held to be improper.[40] An interruption of counsel by the court directing him to make haste in his argument so that it caused him to break down and to omit part of his intended argument, is held to be a matter requiring reversal.

The judge must check all undue demonstration in court by the audience or others, such as applause or hisses, by reprimand, and upon its continuance, or, in severe cases have the offenders summarily arrested and fined for contempt. He should check all abusive language or offensive personalities to itself by fining the guilty party for contempt. The use of insulting and improper remarks by an attorney about a witness, especially in a criminal case, is an abuse of privilege and should be reprimanded by the court.[41] The reasonable discretion of the court, however, should be used in determining when an attorney steps over the just bounds in the language he employs.[42] An attorney should not be permitted to interrupt the reading of instructions to the jury in order to discuss or argue the law with the court.[43]

§ 88. Same Subject, Continued. Jurymen are watchful of the actions of the court and attach great importance to his words and are exceedingly quick to draw conclusions as to what he thinks about the case or to which side the judge may lean, and for this reason great care should be exercised by

37a—Walker v. Coleman, 55 Kan. 381, 40 Pac. 640.

38—House v. State, 42 Texas Crim. App. 125, 57 S. W. 825.

39—Hine v. Bay City Cons. Ry. Co., 115 Mich. 204, 73 N. W. 116.

40—Walker v. Coleman, *supra;* Wheeler v. Wallace, 53 Mich. 355, 19 N. W. 33, 37.

41—People v. Beilfus, 59 Mich. 576, 26 N. W. 771.

42—State v. Hatfield, 75 Iowa 596, 39 N. W. 910.

43—Novack v. Mich. Cent. R. R., 63 Mich. 121, 29 N. W. 525.

the court.[44] In fact, a remark made by the judge in the presence of the jury may be and usually is equivalent to an instruction.[45] Remarks made by the court which, if they were put in the instructions would be error in the case, are sufficient to reverse.[46] An expression of impatience at the waste of time made to one of the counsel in the conduct of the case is held to be error,[47] and the remarks of the court to an attorney on the too frequent use of objections was held to be improper.[48] The court should not express an opinion on the facts in any way, nor on the credibility of a witness or the weight of the testimony in a case. It is as dangerous if not more so, for a judge to convey his thoughts by conduct or mannerisms as it is by words, and it certainly is far more harmful and difficult for the party to correct the same by an appeal. So also it is held to be error for a judge to endorse a witness's respectability by remarks or otherwise and, especially so, where the character of the witness is attacked.[49] Asking questions of a witness in a suspicious way so as to lead the jury to think that the court held an idea that the witness was influenced by a party or was untruthful, is held erroneous.[50]

§ 89. **Same Subject, Continued.** Many matters which the court may do properly may be improper when done in the presence of a jury such as, arresting a witness for perjury or committing him to jail in the presence of the jury when he has just testified.[51] The contrary of this last has been held in New York,[52] although it would unquestionably seem to be the better rule that such actions of the court should take place out of the presence of the jury as far as it is possible so to do.[53] The court should never make any remarks

44—State v. Allen, 100 Iowa 7, 69 N. W. 274; Chicago City Ry. Co. v. McLaughlin, 146 Ill. 353, 34 N. E. 796.

45—Minthon v. Lewis, 78 Iowa 620, 43 N. W. 465; Sullivan v. People, 31 Mich. 1.

46—State v. Philpot, 97 Iowa 365, 66 N. W. 730; Valley Lumber Co. v. Smith, 71 Wis. 304, 37 N. W. 412.

47—Anglo-Am. Packing Co. v. Baier, 31 Ill. App. 653; State v. Pratt, 121 Mo. 566, 26 S. W. 556.

48—State v. Brown, 100 Iowa 50, 69 N. W. 277; State v. Musick, 101 Mo. 260, 14 S. W. 212.

49—McMinn v. Whelan, 27 Cal. 300.

50—State v. Allen, 100 Iowa 7, 69 N. W. 274.

51—Burke v. State, 66 Ga. 157.

52—People v. Hayes, 140 N. Y. 484, 35 N. E. 951, 23 L. R. A. 830.

53—Golden v. State, 75 Miss. 130, 21 So. 971.

to the defendant in court in a criminal case that would in the least affect his credit with the jury.[54]

The court has a discretion in allowing the latitude which counsel may use in their statements to the jury, and where counsel in his argument misstates the evidence grossly, the court may stop the remarks and correct the statement.[55] The statements, however, of counsel for either side should not be considered as serious which are mere exaggerations and which, although not wholly supported, have some ground for a basis in the evidence either directly or by way of inference. While an attorney is an officer of court and as such should be respectful and considerate in his conduct and address to the court,[56] the court should be as careful of his manner towards an attorney or it may be cause for reversal when such conduct would disparage the attorney or tend to prejudice the jury against him.[57]

Remarks of court that the case was not of great importance or that too much time was being consumed and asking the witness to answer quickly was held to be error, although in that case subsequent remarks of the court to the jury were held sufficient to cure the error committed.[58]

§ 90. **Power of Court to Exclude Witnesses.** The number of witnesses on a single point may be and usually is limited,[59] but where the number selected contains one who is incompetent, another cannot be substituted in his place. The court has the power to exclude the witnesses at its discretion during the taking of testimony when it is deemed essential to the discovery of truth.[60] The judge has sole discretion in the matter of excluding witnesses,[61] but this discretion should not be arbitrary or prejudicial to the parties.[62] It is held in Texas that this is not a matter for the discretion of the judge, but

54—Newberry v. State, 26 Fla. 334, 8 So. 445; Perry v. State, 102 Ga. 365, 30 S. E. 903.

55—Com. v. Walsh, 162 Mass. 242, 38 N. E. 436; Pritchett v. State, 92 Ga. 65, 18 S. E. 536.

56—Goldstein v. State, 23 S. W. 686.

57—Williams v. West Bay City, 119 Mich. 395, 78 N. W. 326; Wheeler v. Wallace, 53 Mich. 355, 19 N. W. 33, 37.

58—Crowell v. McGoon, 106 Iowa 266, 76 N. W. 672.

59—State v. Beabout, 69 N. W. 429, 100 Iowa 155.

60—Greenleaf on Evidence, Sec. 432.

61—People v. Machem, 101 Mich. 400, 59 N. W. 664; Hubbel v. Ream, 31 Iowa 289.

62—McIntosh v. McIntosh, 79 Mich. 198, 44 N. W. 592.

that the witnesses must be excluded when required by the parties or the case will be reversed.[63] The object of the exclusion of witnesses is to prevent the testimony of some of the witnesses from influencing others, as well as prevent collusion, but it does not operate in any sense to forbid attorneys in the case to talk to the witnesses.[64] It is better, however, and productive of less error, for the attorneys where such a rule is enforced, to ask the court for permission to speak to the witnesses.[65] The penalty which may be imposed for disobedience is discretionary with the court. It may not be, however, the utter exclusion of the witness from testifying if he disobeys the order, excepting where the party calling him has connived thereat.[66] It is of course a proper matter for recognition as a contempt and punishable accordingly.

§ 91. Remarks by Court Indicating His Opinion of Facts Calculated to Influence the Jury. It is not proper for a court to make remarks in the hearing of a jury calculated to influence their finding.[67] The judge should not invade the province of the jury by intimating his opinion on the facts. To do this directly, especially, where there is any conflict of evidence at all upon which the jury must pass, would be error, and if this cannot be done directly it certainly cannot be done indirectly or by innuendo. To afterwards state to the jury that they are independent of the court in passing on matters of fact would not be sufficient to obviate this error no matter how clearly and distinctly it may be stated.[68]

The judge should refrain from any act or remarks that might be construed as beyond his power or as invading the province of the jury. For this reason it was held error for the court to answer either affirmatively or negatively a question put by the jury as follows, "If we bring in a verdict of guilty can we depend on the clemency of the court?" for the reason that the answer would tend to influence the jury either for or against the defendant.[69]

If the statement made by the court indicates to the jury

63—Watts v. State, 56 Tex. 54.

64—Allen v. State, 61 Miss. 627.

65—Davis v. State, 6 Tex. App. 196.

66—State v. Gesell, 124 Mo. 531, 27 S. W. 1101.

67—Skelly v. Boland, 78 Ill. 438; Furhman v. Huntsville, 54 Ala. 263; Wannack v. Mayer, etc., 53 Ga. 162; Hasbrouck v. Milwaukee, 21 Wis. 217.

68—State v. Ah Tong, 7 Nev. 148.

69—State v. Kiefer, 16 S. D. 190, 91 N. W. 1117; McBean v. State, 83 Wis. 206, 53 N. W. 497.

the belief of the judge on a material fact prejudicial to the defendant in a criminal case, it is a ground for reversal. Even if considered as a mere interrogatory, it is equally erroneous where it is so leading and suggestive in character that had it been asked by the attorney for the state, it should have been stricken out on objection.[70]

§ 92. Conduct of Trial Judge Not to Be Too Closely Scrutinized. The general usage and powers incident to the office of a presiding judge as elsewhere outlined, should not be overlooked in deciding whether or not a judge has stepped beyond the proper bounds of his authority. The proper protection of witnesses against conduct of opposing attorneys or protection of parties against the improper conduct of a hostile and biased opposing witnesses; superintending of an orderly trial to economize time; using of proper means to bring to light such information as justice and truth may require. These are all the great guiding principles in the conduct of a trial judge. It is not every slight mistake or lack of judgment that will constitute error on part of the judge, for perfection is not expected. For this reason the remarks of a trial judge even in a criminal case should not be too closely scrutinized.[71]

Where remarks of the court are addressed to the jury upon matters material to the issues and not merely upon conduct of the trial, adjournment and other similar matters, they violate the requirements of the statutes providing for instructions to be in writing. Where the remarks are not addressed directly to the jury, however, it would be considered otherwise.[72]

So also remarks of the trial judge merely criticising the practice in vogue with reference to instructing jurors are not considered a ground for reversal. But where the jury perceives the bent of the court's mind upon the issues involved, so that it prejudices their minds against parties or their attorneys on either side, thereby depriving them of a fair trial, it would be most clearly error sufficient to reverse the case.[73] A remark made by the court as follows: "I prefer that if there is any stealing to be done on technicalities, that the

70—Cunningham v. People, 195 Ill. 550, 63 N. E. 517.

71—Featherstone v. People, 194 Ill. 325, 62 N. E. 684.

72—Illinois Cent. R. Co. v. Souders, 79 Ill. App. 41.

73—Schintz v. People, 178 Ill. 327, 52 N. E. 903.

Supreme Court say so,'' was held to be error, although the court endeavored to cure it later by an instruction. The remark indicated the court did not propose to assist the party in committing larceny unless the Supreme Court so directed.[74]

§ 93. Remarks of Court to Jury on Expense of Trial and Necessity of Agreeing. Remarks by court to jury touching public necessity of their agreeing, or other remarks calculated to hasten their verdict, however well meant, is a practice that cannot be sustained and is unwarranted by law, and if made in a case where the facts are sharply contested would vitiate the verdict.[75]

Contra: Where a jury, after being out five hours, returned into court and announced their inability to agree upon a verdict, instructions upon their duty as to reconciling their views and arriving at a verdict, if consistent with their consciences, rather than that the parties should be put to the trouble and expense of trying the case again, nothing being said to the prejudice of either party, are held not erroneous.[76]

74—Kramer v. N. W. Elevator Co., 91 Minn. 346, 98 N. W. 96.

75—Farnham v. Farnham, 73 Ill. 497.

76—Pierce v. Rehfuss, 35 Mich. 53; Allen v. Woodson, 50 Ga. 53.

In People v. Miles, 143 Cal. 636, 77 Pac. 666, 667, the trial court said: "It costs several hundred dollars to get a jury together to try a criminal case. It is an expensive matter. If there is a mistrial in a criminal case, the district attorney may bring it on for trial again, and a great expense attaches to the trial of such cases. * * * If you think there is any possibility of arriving at a verdict and thus saving the county the expense of a retrial, I am willing to read the instructions to you again. * * * It will save a good deal of expense if this case can be finally determined by this jury, but, as I said before, I have no desire to force you to retire again to the jury room if there is no possibiiity of your arriving at a verdict. * * * You are all taxpayers—you would not be in the jury box if you were not all on the assessment roll of the county—and it should be your desire more than that of any others that the county should be saved as much expense as possible. All I want to know is whether there is a probability of your arriving at a verdict as to both of the defendants or as to one of them. You must arrive at a verdict, if you do at all, solely from the evidence and the instructions given you, not from any convenience to any of you, or any inconvenience to any of you by reason of being kept in the jury room."

In commenting on this the Supreme Court said: "No intimation whatever was given as to how the court regarded the evi-

§ 94. **Undue Interference by Court During the Trial.** The trial in an American court cannot go too far from the vicious and cruel travesty known as a trial in one of the courts of France. A judge is there furnished with what is known as a "Process Verbal," an instrument drawn up by a court of-

dence; its whole purpose was to require a reasonable effort on the part of the jury to come to some conclusion one way or another, and not cause a mistrial. In reminding the jury of the expense of the trial, and the desirability to them, as taxpayers, of avoiding a repetition of this expense, he was saying no more to them than they, as taxpayers and intelligent men, must be presumed to have known without being told by the court. In Niles v. Sprague, 13 Iowa 189, the trial court told the jury the case had been twice tried, and that it was important that they should agree. The appellate court said: 'To this action or remark we can see no just ground of objection. If improper, it was as much so to defendants as to plaintiffs. But it was so to neither. It was not only right but the duty of the court to remind the jury of the protracted litigation, and of the necessity on their part to labor honestly and faithfully to arrive at a verdict and thus terminate a controversy which time only tended to make more expensive and embittered. There was no intimation as to how they should decide, but a general remark that they ought to agree if they could satisfy their minds.' In another case the jury were told the case had been long pending and had been exhaustively tried, that a new trial would entail large expense, etc., and in view of these facts they were directed to return to their rooms and examine their differences in a spirit of fairness, etc. The court said: 'But we fail to discover either error or prejudice in any part of it. What the court said was abundantly true, and practical, and ought to have occurred to the jury without the necessity of having it said to them by the court.' Frandsen v. C. R. I. & P. R. Co. 36 Iowa 372.

"These were civil cases, and there was no suggestion to the jurors that the expense of the trial might fall upon them as taxpayers. We cannot see, however, that this fact would change the reason for upholding the admonition of the court. The point is that it was proper for the court to urge the importance of reaching a verdict, and, as it intimated no opinion of its own or suggested how the verdict should go, the defendants were not prejudiced. Indeed, the jury were quite as likely to find for the defendants as for the people under such an admonition. Nor can we say but that the jury were influenced by the re-reading of some of the testimony, and not by the remarks of the court."

In Jessen v. Donahue, 4 Neb. (Unof.) 838, 96 N. W. 639 (640-1), the trial court instructed the jury as follows: "You now have been deliberating upon your ver-

ficer similar to an indictment in a criminal case, containing the entire history of the accused from infancy. The judge proceeds with an inquisitional examination of the prisoner based upon this instrument. The examination is full of low, browbeating questions, mixed with slurs and inuendos, to all of

dict for more than 29 hours. Now, where a jury finds difficulty in agreeing, and various jurors entertain different ideas concerning the evidence or inferences and conclusions to be drawn therefrom, it is the duty of each juror to listen patiently to, and consider the argument, of his fellow jurors, with an honest desire to ascertain the truth of the matters concerning which you disagree. No juror should contend for his original ideas or conclusions concerning matters of disagreement after he has become convinced that his position first taken was wrong. No juror should hold out through a spirit of stubbornness. Neither should a juror permit the friendship or admiration, the ill feeling or prejudice, he may entertain for any counsel connected with the case, to influence him.

"Considerable time has been consumed in the trial of this case. It is not probable that further evidence can be furnished another jury in the trial of the case if you are finally discharged because you cannot agree and the case is again tried. You are probably in as favorable a position to decide the case as another jury can be. I want you to realize that it is your work and your duty to decide this case, and to decide it correctly. I hope you will, on retiring to your room, do so, each with the honest, conscientious desire to agree and to return a verdict which is justified by the evidence and the law, and which will meet the approbation of your own conscience." This was approved on appeal.

In Kelley v. Emery, 75 Mich. 147, 42 N. W. 795, the trial court said: "Gentlemen of the jury, this case has already been tried once, and the amount involved is not very large, and the parties cannot afford to litigate forever, and the county cannot afford to have them do it. You see it takes some time to try the case, and I hope you will be able to arrive at a conclusion and settle the facts in the case at least."

In commenting, the Supreme Court said: "It is claimed that by this charge the jury were coerced into finding a verdict. This statement by the court could not have had any such effect. It was simply an admonition to the jury to agree, if possible, upon the facts of the case, and one which the court might very properly make. It appears that the case had once been tried, and on that trial the jury failed to agree, there being such a conflict of testimony. We do not see how this portion of the charge affected the verdict, or had any influence in favor of or against either of the parties. It was important in that, as in other cases, that the jury settle the disputed questions of

which the jury listens. It is a marvel any one guilty or innocent could escape conviction under such procedure.

A judge may, with entire propriety, ask pertinent questions of counsel during examination of a witness, although it in effect puts the witness on his guard by disclosing facts counsel did not wish him to know.[77] The court may, in proper instances, state his recollection of evidence to the jury, although this would seem to be extreme, and, in view of the fact that the evidence is usually taken down by the reporter, would seem to be unnecessary.[78]

Conduct of the judge in conversing with a witness whether in or out of court, especially to ascertain his knowledge about the case or suggesting to him that he should disclose matters more than he had already disclosed on his examination is certainly reprehensible.[79]

§ 95. Communications with the Jury After Retirement. After the jury have retired to deliberate upon their verdict, no communication should be had between them and any one else whatever, whether it be the court or the officers in charge, or, least of all, the parties. The mere fact, however, of a communication, when it is not concerned with the case under advisement, would not necessarily be prejudicial.

A bailiff in charge of the jury should not remain in the jury room or hold communication with the jury, and it has been held such misconduct as to vitiate the verdict for a bailiff to remain in the jury room all night while the jury were considering the case, answering questions concerning the case and even threatening to report a juror to the court and have him fined for declining to vote.[80] Any prejudicial communica-

fact arising on the trial; and the court, without intimating its opinion of the facts upon this part of the case, advised the jury that it was for the best interests of the parties, and would save costs to the county, if they could in that trial settle the facts in the case. No one could be prejudiced by this portion of the charge."

So, too, in Shaller v. Detroit United Railway, 139 Mich. 171, 102 N. W. 632 (633), the following remarks by the trial judge were approved: "Gentlemen, take the case and take your own time for considering it, no matter how much time is required. Engage in no discussion that will tend to prevent your agreeing; consider the evidence and all the facts, and reach a verdict if you can, such as shall hereafter satisfy your individual consciences, and the court will be satisfied."

77—City Bank v. Kent, 57 Ga. 285.

78—Eddy v. Gray (Mass.), 4 Allen 435.

79—Sparks v. State, 59 Ala. 82.

80—Heston v. Neathammer, 180 Ill. 150, 54 N. E. 310.

tion by a bailiff to the jury during deliberation is held to warrant a reversal of the case.[81]

It seems a remark of the bailiff is not prejudicial unless it is clearly apparent from the words themselves or when there is no design on the part of the officer to favor either party and where it had no effect upon the verdict. A remark of an officer that "He did not know but that the jury would have to stay out until Saturday night," was for the reason just stated held to be insufficient to reverse the case.[82] The judge should not hold a conference with jurors either collectively or individually, but it was held not misconduct sufficient to warrant a reversal of the case where the presiding judge in the presence of the attorneys for both sides, as well as officers of court, held a conversation with the plaintiff with reference to sending his son to the institution of which he was in charge and handing him his son's address with a request that a catalogue be mailed.[83]

§ 96. Communications between Court and Jury. Inquiries directed to the jury not relating directly to the issues are not improper, but communications bringing to bear any influence upon the jury especially while deliberating upon their verdict is held error. The presiding judge may, however, inquire whether the jury will be able to reach a verdict, but not to lead them to think a verdict is demanded within a limited time, and it is even held proper for a court to inquire of the jury on what grounds a verdict was found.[83a]

During the deliberations of the jury a judge should not go to the jury room, stand in the door and answer questions put by the jurors.[84] If the jury desire further instructions they should be brought into court for that purpose.[85]

§ 97. Display of Anger and Ridicule by Judge. The manner of intercourse between court and bar is rightly left to good sense and breeding which should be characteristic of both. The courts are not inclined to consider the mere irritability and loss of temper of the judge as sufficient to warrant a reversal of the case, although it certainly would seem to be

81—Wilkerson v. State, 70 Miss. 356.

82—Leach v. Wilbur, 91 Mass. 212.

83—Danville Democrat Pub. Co. v. McClure, 86 Ill. App. 432.

83a—Lawler v. Earle, 5 Mass. 1.

84—Hurst v. Webster Mfg. Co., 128 Wis. 342, 107 N. W. 666.

85—Martin v. Martin, 126 Wis. 237, 105 N. W. 783.

as damaging in effect as spoken words might be upon the minds of the jury. Displays of anger and severity amounting almost to hostility are held not sufficient ground for a reversal in the absence of error in the rulings of the court.[86]

It is held not to be reversible error for a trial court to fine an attorney for contempt, even while actively engaged in trial of a case.[87] The remarks, however, of the trial judge made upon the trial indicating disfavor towards the accused was considered a good ground for the reversal.[88] So, also, remarks of the trial judge as follows: "I say there is evidence to show guilt," was held a good ground for a new trial.[89] Ridiculing of witnesses by the trial judge is certainly improper,[90] and where during examination of a witness the court remarked, "Evidently, sir, this man is making his evidence out of whole cloth," the court considered this prejudicial error as improperly discrediting the witness.[91] Where the court makes remarks concerning the respectability of any witness it is error.[92]

The remarks of the court to a witness concerning his fallibility and liability to make mistakes was held to be in substance an instruction to the jury upon a question of fact, the party being entitled to have the jury pass upon this fact.[93] Parties to an action are entitled to have the jury pass upon the evidence in the case without having its effect diminished or increased by remarks made by the court concerning the

86—Reilly v. Chgo. City R. Co., 90 Ill. App. 364.

87—Pinkerton v. Sydnor, 87 Ill. App. 81.

88—Synon v. P., 188 Ill. 625, 59 N. E. 508.

89—Feinberg v. P., 174 Ill. 617, 51 N. E. 798.

90—Fish v. Ryan, 88 Ill. App. 526.

91—Swenson v. Erickson, 90 Ill. App. 358.

92—McMinn v. Whelan, 27 Cal. 300.

93—State v. Tickel, 13 Nev. 502; People v. Bonds, 1 Nev. 33.

Where a witness for defendant made some apparently inconsistent statements to the effect he was to be paid for his loss of time while attending as a witness, also stating shortly afterwards that he was to receive $2.00 a day and then again at another time stated he was to receive his wages and in the evidence it appeared that his wages was the sum of $2.00 per day at the time of the agreement, although afterwards they were less, the court remarked, "that he did not see any need of arguing the case very long with the witness. He says one thing one minute and another thing the next." It was held these remarks were improper and constituted reversible error. Chicago City Ry. Co. v. Wall 93 Ill. App. 411.

evidence either to the jury, witnesses, or counsel, and such conduct would constitute reversible error, providing it tended apparently to influence the jury in their verdict.[94]

A judge necessarily possesses considerable power in presiding over the trial, but great care should be taken that in the exercise of this power he does not indicate a bias for or against either party so as to influence the jury or create an impression that the court is taking sides one way or the other.[95]

The propriety of the conduct or misconduct of the judge in making prejudicial remarks should be excepted to at once in order to be considered by the appellate courts.[96]

§ 98. Admonishing Jury as to Conduct During Separation. The court may and should admonish the jurors during their impanelment, as well as during the trial of the case, whenever they are allowed to separate, to refrain from talking with any one about the case, or to allow any one to talk to them about it in their presence and hearing, and to go away from all such persons and to remind them that they are jurors and if they do not then desist, to report them to the court, and to refrain as far as possible from reading any newspaper accounts or comments upon the case in which they are impaneled as jurors. Disregard of this admonition would tend to prejudice the mind of a juror, provided what he heard, or read, was of a nature calculated to affect the mind, and would amount to such misconduct on the juror's part as to warrant granting of a new trial if demanded.

§ 99. Separation of Jury Constituting Error. An adjournment from day to day is an unquestioned right which the court has on the ground of necessity, but this does not permit the jurors to disperse. Under the ancient common law, trials lasted but for a single day and there was no necessity for any continuance. The power of the court to order a continuance was denied, but in modern times, trials being protracted over days and even weeks, an adjournment from day to day for rest and refreshment is an absolute necessity, the court giving the jury such rules and instructions regarding their conduct as to prevent prejudice resulting to the parties. The jurors were

94—McDuff v. Detroit Evening Journal, 84 Mich. 1, 47 N. W. 671; Kane v. Kinnare, 69 Ill. App. 81.

95—Looney v. People, 81 Ill. App. 370.

96—Mulliner v. Bronson, 114 Ill. 510, 2 N. E. 671; Hall v. First Nat. Bank of Emporia, 133 Ill. 234, 24 N. E. 546; Voss v. Waukashaw, 90 Wis. 337, 60 N. W. 280.

formerly forbidden to separate or to mingle and converse with the public. They were, in fact, kept as prisoners, but great liberality now exists in this respect; care being taken to avoid any conduct of the jury, or the members thereof, prejudicial to the parties.

Separation alone is of itself not usually considered a sufficient ground for a new trial, except in capital cases. In some states it is considered sufficient ground for reversal in all felony cases unless it appears that no prejudice resulted by reason thereof. A mere unexplained separation in cases where the usual practice and the law requires the jury to be kept together would raise such a presumption against the verdict as to call for a new trial.[97]

These strict rules do not apply in civil cases generally, except where the separation takes place after the charge to the jury and their retirement for deliberation. Even then it has been considered proper for the judge to allow the jury, before making up their verdict, to separate for rest and refreshment in cases where the deliberation is long and protracted.[98]

§ 100. Separation, when a Matter of Discretion with the Court. In cases involving a misdemeanor it is a matter of discretion with the court to allow the jury to separate before verdict. The court must decide if a separation would be detrimental, and having decided that it would be so, a new trial would be given if the jury separated contrary to the order of the court. But in none of these cases would a separation be considered of material consequence if no misconduct or prejudicial matter transpired at all.[99]

§ 101. When Separation Will Warrant Granting of New Trial. It is a general rule that the mere separation or dispersal of a jury without consent of parties is a ground for

97—Adams v. People, 47 Ill 376; Reins v. People, 30 Ill. 256, 83 Am. Dec. 186; Stutsman v. Barringer, 16 Ind. 363.

98—Stancell v. Keenan, 33 Ga. 56.

In W. Chicago St. Ry. Co. v. Lundahl, 82 Ill. App. 553, the court held that a temporary absence of a juror from his fellow jurors is not necessarily prejudicial. It was held not to be error for a juror in company with the bailiff to go to an adjoining room and telephone some instructions to one of his employees. He talked with no other person and the bailiff was with him during all of the time. Such conduct having in no way prejudiced the party, could not be taken advantage of as error.

99—Davis v. State, 35 Ind. 496, 9 Am. Rep. 760.

new trial, and in a criminal case, even with consent of defendant. The courts have gone so far as to hold that a separation of the jury during their deliberation was of little importance and a new trial refused even where one of the jurors went home to do some work while a committee of the jury were busy investigating the controversy; but this is an extreme case and apparently not a precedent that would be likely to be followed.[100] It is a grievance to subject a party to a new trial on the ground of misconduct of the jury and is not done unless it is reasonably clear that the opposing party has been prejudiced by such misconduct. The absconding of a juror has been held to result in a new trial, for a juror cannot by his own act and misconduct work a discharge of the defendant.

It is a general rule that the separation of a jury without consent of parties is ground for a new trial, excepting in the absence of prejudice. In criminal cases the consent of the defendant has been held immaterial. Consent is always a release of errors whenever the jury separates by consent, but this can only be where the parties are free to consent, and under no restraint or fear. This is not so in criminal cases, for it is obvious that the refusal of a prisoner to agree to a separation of the jury, might prejudice him with the jury. Where, however, the defendant of his own accord, voluntarily asks for a separation of the jury, and there is no solicitation, it would be entirely different and his consent would be valid.[1]

100—Edrington v. Kiger, 4 Tex. 89.

1—Stephens v. People, 19 N. Y. 549.

CHAPTER VIII.

EXAMINATION OF WITNESSES AND INTRODUCTION OF EVIDENCE.

§ 102. Control of Court over Examination of Witnesses. The trial court has full control over the method and manner of counsel in the examination of witnesses, may arrest an examination which is needlessly extended,[1] and may refuse to

1—State v. Miller, 93 Mo. 263, 6 S. W. 57.

allow counsel to go over matters which have already been gone over sufficiently.[2]

The court should protect a witness from uncalled for abuse and any personal conflict between the witness and counsel should be prevented.[3] Such methods in maintaining order and decorum should be adopted that a witness may have a fair show in stating his testimony in such manner that the meaning he intends to convey may be apparent; for this reason a continued interruption of testimony by counsel may be stopped.[4]

Indecent questions should not be put to a young child,[5] and vulgar words, although the exact words called for by the question, need not be given by a witness when the truth and meaning thereof can be as easily given in other languages.[6] Conduct of counsel in insinuating in questions he asks that the witness has the character of a spy or an informer is improper and should not be allowed.[7] Likewise, asking of questions upon cross-examination for the purpose of showing wealth of the party, is ground for a new trial if it resulted in prejudice. Language which conveys an intimation of an attempt to settle having been made by one of the parties is improper in questions asked of witnesses.[8]

§ 103. Admission of Evidence by the Court. The admission of evidence, whether in chief or rebuttal, is within the court's discretion.[9] The court may admit evidence out of its regular order as it may deem best,[10] and evidence has been allowed to be put in even after the argument has begun.[11] It is within the power of the court to say when evidence is offered too late in the case.[12] Greater latitude is allowed in equity cases than in common law actions triable by jury and further

2—State v. Brown, 100 Ia. 50, 69 N. W. 277; People v. Harrison, 93 Mich. 594, 53 N. W. 725; Buck v. Maddock, 167 Ill. 219, 47 N. E. 208.

3—Baldwin v. St. Louis, K. & N. W. Ry. Co., 75 Iowa 297, 39 N. W. 208, 1 L. R. A. 318.

4—State v. Scott, 80 N. C. 365.

5—People v. White, 53 Mich. 537, 19 N. W. 174.

6—State v. Laxton, 78 N. C. 564.

7—Field v. French, 80 Ill. App. 95.

8—Gundlach v. Schott, 95 Ill. App. 119.

9—Eckhart v. People, 116 Ill. App. 408; Louisville & N. R. Co. v. Board, 28 Ky. L. Rep. 921, 90 S. W. 944.

10—Cook Mfg. Co. v. Randall, 62 Iowa 244; Campbell v. Ormsby, 65 Iowa 518, 22 N. W. 656.

11—Eberhard v. State, 47 Ga. 598.

12—Van Camp v. Keokuk, 107 N. W. 933.

evidence in such cases has been allowed within the court's discretion even after the case had been formally closed.[13]

Evidence which is competent for any purpose in the case is as a rule admissible,[14] but cumulative evidence or mere repetitions which have already been offered may be excluded, although entirely competent.[15]

§ 104. Withdrawal of Evidence. Evidence which has been produced on the trial has, as a rule, gone beyond control of the party which offered it, although the court may in its discretion allow it to be withdrawn. If the evidence had a prejudicial effect upon the jury it should not be allowed to be withdrawn, for the opposing party has then the right to meet it. The withdrawal of improper evidence, which has prejudiced the opposing side, will not cure the error.

The withdrawal of improper evidence cannot be objected to with any degree of force by a party who has objected to its admission, except in event of prejudice, and one who objects to the withdrawal cannot afterwards complain of its admission, although he made proper objections at the time it was admitted.[16]

§ 105. Order of Introducing Evidence within Court's Discretion. The usual and well defined order for introducing evidence is always the best. Such rules are not mandatory, but merely directory, and the court may depart from these rules whenever justice seems to demand it. Although the courts have a large discretion in this matter, the parties should not be allowed to introduce evidence haphazard, but should as far as possible, be governed by an orderly rule subject only, in rare instances, to an exception. An appellate court will not interfere with the use of the lower court's discretion in this respect except in an instance of the gravest abuse, for the reason that no good could ordinarily result from a reversal of the case upon this ground.[17]

The general rule seems to be that the discretion of the court will govern in receiving evidence in the case and in the order thereof.[18] The court may properly allow rebuttal evidence to

13—Argo v. People, 78 Ill. App. 247; Winn v. Itzel, 103 N. W. 220.

14—Mighell v. Stone, 175 Ill. 262, 51 N. E. 906.

15—Gulf, C. & St. F. Ry. Co. v. Hayes, 89 S. W. 29.

16—N. Y. C. & St. L. Ry. v. Blumenthal, 160 Ill. 40, 43 N. E. 809.

17—Crane v. Ellis, 31 Iowa 510.

18—McClellan v. Hein, 56 Neb. 600, 77 N. W. 120.

be given upon the direct, especially where the evidence that the opponent relies upon is known.[19] On the other hand, it is held that evidence which is essential to make out the plaintiff's case cannot be withheld and given on rebuttal, even though it should have a tendency toward rebutting the opponent's evidence.[20] Evidence properly belonging to the case in chief as a general rule should be excluded when offered in rebuttal.[21] When a mistake or inadvertence has occurred or where a witness was unable to be secured in proper time to testify on the direct, the court, in its discretion, will usually allow the plaintiff to introduce evidence in chief on the rebuttal.[22] It has been held to be inadmissible upon rebuttal even if it was not known to the party until after the close of his direct examination.[23] This is an extreme case and it is doubtful if it does not violate the very spirit of the general rule that the order of introduction of evidence lies in the sound discretion of the court.

§ 106. What Evidence Should Be Introduced on the Direct. It is often difficult to decide whether a party who has the burden of proof should put forth all his evidence in support of his case on direct examination, or to put in only so much as may be necessary to make out a *prima facie* case awaiting defendant's evidence in answer or in support of counter-claims, set-offs or affirmative issues which he may have as against the plaintiff.

Plaintiff, however, cannot be allowed to go into half of his case and reserve the remainder until the defendant has put in his evidence. In the main, only such evidence should be allowed on the examination in chief, as directly supports the making out of a *prima facie* case and rebuttal evidence should be confined to such matters as explain away or deny the facts set up by defense or attacking credibility of his witnesses, and as to matter explaining the evidence set forth on examination in chief, which has been attacked by the defendant.

19—Hintz v. Graupner, 138 Ill. 158, 27 N. E. 935.

20—Moehn v. Moehn, 105 Iowa 710, 75 N. W. 521.

21—Howes v. Colburn, 165 Mass. 385, 43 N. E. 125.

22—Mueller v. Rebhan, 94 Ill. 142; Hathaway v. Hemingway, 20 Conn. 191; Chytraus v. Chicago, 60 Ill. 18, 43 N. E. 335; Hess v. Wilcox, 58 Iowa 380, 10 N. W. 847; People v. Wilson, 55 Mich. 506, 21 N. W. 905.

23—Hale v. L. I. & I. Co., 65 Minn. 548, 68 N. W. 182.

A plaintiff is not called upon to disprove an imaginary defense or claim set up by the opposing party. Cooper v. Francis, 37 Tex. 445; Luke v. Bruner, 15 Iowa 3.

The party having the opening should, as a general rule, introduce all evidence on direct examination, excepting for the purpose of rebutting or explaining away evidence given by the other side, although in some states the making out of a *prima facie* case is sufficient and further evidence to support it is allowed during rebuttal.[24]

After the plaintiff has closed his case, additional evidence supporting it may be obtained by cross-examination of opponent's witnesses,[25] but this does not include examination of opponent's witnesses upon matters not brought out in their examination in chief.

§ 107. Evidence Introduced Piecemeal—Duty to Show Relevancy. It is manifestly impossible always to offer evidence in a logical manner. Evidence must be offered a little at a time and every portion cannot be stamped with the mark of relevancy. It is relevant more or less as it connects with other evidence. That it will be made relevant later on is presumed and if not so made, it may be stricken out. If the court should consider that there is no apparent connection, counsel may be asked to explain what he intends to prove by such evidence. The court should not, however, be too strict in demanding such a statement, as it is more or less embarrassing to be compelled to make such explanations in the presence of the jury.[26]

The court may, subject to its sound discretion, require a party to fully examine a witness upon all matters upon which he may be called to testify, before calling another.[27] In no event should the court allow the parties to give evidence in a haphazard form and by piecemeal.[28]

§ 108. Evidence Admitted Provisionally. Statements by counsel that evidence later on will be produced connecting the evidence in question with the case, are proper to be taken into consideration by the court and such evidence allowed to go in

24—Martin v. Capital Ins. Co., 85 Iowa 643, 52 N. W. 534; Central Ry. v. Nash, 81 Ga. 580, 7 S. E. 808.

25—Commonwealth v. Eastman, 48 Am. Dec. 596; Ranney v. St. Johnsbury & L. C. R. Co., 67 Vt. 594, 32 At. 810.

26—Rogers v. Brent, 10 Ill. 573. It is improper to offer en masse a large number of exhibits. Dowie v. Priddle, 216 Ill. 553, 116 Ill. App. 184, 75 N. E. 243.

27—Anderson Tr. Co. v. Fuller, 174 Ill. 221, aff., 73 Ill. App. 48, 51 N. E. 251; Fowler v. Strawberry Hill, 74 Iowa 644, 38 N. W. 521.

28—Sandwich v. Dolan, 141 Ill. 430, 31 N. E. 416.

provisionally. When evidence is admitted on the statement of counsel that he will afterwards remedy such defects in the proof, the court should not afterwards strike out such evidence on its own motion without being requested so to do.[29] However, it has been held that it is not error to admit evidence provisionally where no promises to connect have been made.[30]

The practice of receiving evidence provisionally on statement of counsel is not to be commended.[31]

Cross-examination is not generally subject to this rule, for the reason that if the court should ask counsel for a statement concerning the tendency of his questions the very object of his cross-examination would be defeated. In cases which involve a written instrument on the genuineness of which the parties take issue, evidence should not be admitted provisionally.[32]

§ 109. Further Testimony after the Close of the Case. Evidence may be allowed after the case has closed on the part of either party,[33] although with less liberality for the reason that all the witnesses have then been dismissed and a party might for this reason have no means of contradicting such offered evidence.

It has been held that evidence may be offered at the conclusion of the arguments in the case. This would seem to be a matter which should only be allowed under the sound discretion of the court, and especially should be discountenanced if it appears that the evidence proposed is designed to meet the matter upon which greatest stress has been placed in the argument.[34]

29—Hix v. Gulley, 124 Ga. 547, 52 S. E. 890.

30—Brady v. Finn, 162 Mass. 260, 38 N. E. 506; Foley v. Tipton, 102 Iowa 272, 71 N. W. 236.

31—Woolen v. Wire, 110 Ind. 251, 11 N. E. 236.

32—Baum v Palmer, 165 Ind. 513, 76 N. E. 108.

33—Huey v. Huey, 26 Iowa 525; Meadows v. Hawkeye Ins. Co., 67 Iowa 57; Smith v. State Ins. Co., 58 Iowa 487, 12 N. W. 542.

Court has properly permitted the introduction of evidence after the case is closed, for the purpose of correcting an oversight or mistake.

34—Dugan v. State, 116 Ga. 846, 43 S. E. 253; Tucker v. People, 122 Ill. 583, 13 N. E. 800; Bolan v. People, 184 Ill. 338, 56 N. E. 408; Stepp v. Claiman, 123 Ind. 532, 24 N. E. 131; Smith v. Ins. Co., *supra;* State v. Wright, 112 Iowa 436, 84 N. W. 541; Hamilton v. Iowa B. Co., 88 Iowa 364, 55 N. W. 496.

The court has the right in the exercise of solemn discretion to make any order for the introduc-

§ 110. What Evidence the Jury May Consider. Questions at issue on the trial are determined by the jury upon evidence produced before them. This evidence may consist of the oral testimony of witnesses sworn and examined in open court or by the testimony of witnesses residing out of the jurisdiction of the court taken in the form of depositions. This latter can only be done, however, on the part of defendants in criminal cases. Any evidence which appeals to the convictions of the jury, whether it be conveyed to them by the sense of hearing, of sight and perhaps, even through the sense of smell or feeling, is competent, provided such testimony be subject to the test of cross-examination by the opposite party.

§ 111. Previous Disclosures of Evidence Discussed. The ancient common law trial seemed full of the spirit of sportsmanship; it was like a game of cards, the party held his hand secret and waited for an opportune time to overwhelm his opponent. His weapons of attack and defense were concealed until the final moment.

This was of good use to keep from unscrupulous opponents the facts, so they could not arrange their testimony to upset the other side. If the opponent were an honest man this would on the other hand inform him of the frailty of his defense and so cause him to drop the controversy. If the party was notified in advance he could not alter the truth, nor should he be allowed to do so.

If, however, the opponent was the victim of a plot and false evidence was being used against him, as was often the case, it were better that he be made aware of the facts. However, if

tion of evidence it may see fit, and its decision will not be reversed unless such discretion has been abused.

Peterson v. Wood Mowing and Reaping Mach. Co., 97 Iowa 148, 66 N. W. 96; Miller v. Hartford Ins. Co., 70 Iowa 704; Cannon v. Iowa City, 34 Iowa 203; Kassing v. Walter, 65 N. W. 832.

Evidence may be properly introduced although out of its regular order.

Cook Mfg. Co. v. Randall, 62 Iowa 244; Campbell v. Ormsby, 65 Iowa 518.

Additional evidence in chief may be allowed after the testimony has been taken on the part of the defendant.

Hubbell v. Ream, 31 Iowa 289; McDonald v. Moore, 65 Iowa 171; State v. Yetzer, 97 Iowa 423, 66 N. W. 737.

After both sides have rested it has been held proper to introduce further evidence.

Byington v. Moore, 62 Iowa 470; State v. Shean, 32 Iowa 88; Maher v. Shenhall, 96 Iowa 634, 65 N. W. 978.

the evidence against him were true, there would be no necessity for such disclosures of evidence. On the whole it was a question whether falsity or truth would be best served by a previous disclosure of the evidence.

§ 112. **Inspection of Documents.** Documents, chattels and premises were all permitted to be inspected at common law, and documents copied as this could not endanger their integrity. On this principle rests the modern right of the inspection of a document offered for evidence by a party, and if its production causes an opponent to be taken by surprise it may be excluded, or in the discretion of the court a continuance or postponement of the trial may be granted, and even after a verdict it may be sufficient to warrant the granting of a new trial.

Many of these difficulties are solved, however, by the modern system of pleading, and if necessary, pleadings may be made more specific. Usually all written instruments upon which the action is based must be appended to the pleadings, greatly minimizing the danger of surprise, for the reason that the proofs on the trial must correspond with the allegations.

§ 113. **List of Witnesses and Copy of Indictment Furnished Accused—Rule as to Subsequently Discovered Witnesses.** Under the common law rule no provision was made for a list of witnesses and much less a copy of the indictment even in criminal trials involving a felony until statutory provisions were made correcting this injustice. A list is furnished the accused by the proper court officer or upon a motion demanding it. Where it is not given, the witnesses may be excluded or a continuance at least will be granted.

In some states it is provided that the accused must be furnished a list of all witnesses sworn before the grand jury upon which the indictment is based and so endorsed by the foreman thereof. This provision does not absolutely exclude the testimony of witnesses subsequently discovered and it is held constitutional to serve upon the defendant a list of such subsequently discovered witnesses, together with the substance of their testimony, a reasonable time before the trial.[35]

35—Witnesses not named on indictment may be permitted to testify at discretion of court. Gore v. P., 162 Ill. 265, 44 N. E. 500; Bolen v. P., 184 Ill. 340, 56 N. E. 408.

In State v. Abrahams, 6 Iowa 117, upon the question whether the prosecuting attorney is to be confined to the list of witnesses on the back of the indictment or may call others, the court said: "It

§ 114. Presence of Witnesses. The presence of witnesses in civil cases may be dispensed with when parties take the testimony by way of depositions, but this does not apply in criminal cases on the part of the prosecution, as the accused has a right to meet the witnesses face to face. It is so guaranteed in the State of Illinois by the constitution of 1870.[36] The right of the accused to be in the presence of witnesses is held not to be violated by ordering the defendant to be seated at a distance when the witness was afraid of defendant,[37] nor is one confronted with his witness when he must sit 24 feet away, where he cannot see witness's face or hear the testimony, although the witness was afraid of accused and would not testify unless he was removed.[38]

§ 115. Oaths or Affirmations of Witnesses. It is universally recognized that any statement by a witness must be made under the sanction of an oath, or the equivalent thereto, as an affirmation, or a dying declaration in homicide cases. In general, anyone who understands the nature of an oath, is competent to testify. The right to affirm, instead of taking an oath, is recognized as absolute, and is a lawful substitute whenever an oath is specifically required.[39] No person shall be rendered incompetent to give evidence in any court of law or equity in consequence of his opinions on the subject of religion. In the

would make it necessary to search all possible evidence before presenting an indictment and thus favor the escape of the guilty. There is no principle of law or natural right which entitles a defendant to a previous knowledge of all the witnesses to be called against him. The statute gives the defendant the names of those upon whose knowledge the charge is based as known to the prosecution at the time. This has been changed now by section 5373, Iowa Code, 8970."

36—Const. of Ill., Art. 2, Sec. 9; Hoyt v. People, 140 Ill. 588, 30 N. E. 315.

It is error to swear witnesses in the absence of the accused. Bearden v. State, 44 Ark. 331.

37—Grabowski v. State, 126 Wis. 447, 105 N. W. 805.

38—Hoft v. Utah, 110 U. S. 574; Lewis v. U. S., 146 U. S. 370.

39—Goodman v. P., 90 Ill. App. 540.

At common law the accused could not testify, but this is now entirely changed by statute and he may testify as any other witness. Where the accused could not testify, he was accorded a right to make an unsworn statement to the jury of the facts of the case according to his point of view, and he was not subjected to cross-examination. 3 Code of Ga. Sec. 1010; Rev. Stat. Fla., Sec. 2908; Georgia and Florida hold this latter rule.

Constitution of Illinois, 1870, Article 2, Section 3, it is provided that "no person shall be denied any civil or political right, privilege, or capacity, on account of his religious opinions, but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations."[40]

§ 116. Copy of Former Testimony of Witnesses, When Admissible. Besides the admission of oral testimony upon the trial it is permissible and proper to use a copy of the former testimony of witnesses who testified at a previous time and to have it read in evidence before the jury both in criminal and civil cases. In some jurisdictions the old common law rule still applies, that the evidence of the absent witness is not admissible except where such witness is dead.[41]

§ 117. Showing Required to Admit Former Testimony. In some jurisdictions a strict showing for not producing a witness is not required except in criminal cases, where a strict preliminary proof is demanded.[42] It is held that a mere transitory residence outside of the state, so that a subpoena could not be served, is sufficient,[43] but the best modern rule requires that the residence of the witness outside of the jurisdiction should be permanent and a showing must be made to the satisfaction of the court that the party could not by the use of reasonable diligence have secured the deposition and that if fruitless search for the witness had been conducted in good faith and diligence. Such diligence may be shown by the fact of having written to the postmaster or by delivery of letter to the summoning officer.[44]

Absence from the jurisdiction making it impossible to use compulsory process to secure attendance, is a sufficient ground

40—An oath must lawfully be administered in the following form, to-wit: The person swearing shall, with his hand uplifted, swear by the ever living God, and shall not be compelled to lay the hand on or kiss the Gospels. Rev. St. Ill. 1874, C. 101, § 3.

When such person shall have conscientious scruples against taking an oath, he shall be admitted, instead of taking an oath, to make his solemn affirmation or declaration in the following form, to-wit: You do solemnly, sincerely and truly declare and affirm. Rev. St. Ill. 1874, C. 101, § 4.

An attorney should not administer an oath to his client. Phillips v. Phillips, 185 Ill. 633.

41—Collins v. Commonwealth, 12 Bush, Ky. 271.

42—Bergen v. People, 17 Ill. 426, 65 Am. Dec. 672.

43—Monroe Bank v. Gifford, 79 Iowa 300, 44 N. W. 558, 9 L. R. A. 126.

44—Boldwain v. St. Louis R.

for admitting the former testimony in either civil or criminal cases under the proper limitations mentioned herein.[45] The absence from the jurisdiction must be shown by the testimony of some one who knows this fact in order to establish a ground for its admissibility.[46]

Where the witness is absent apparently by procurement of one of the parties, the former testimony is admitted as a matter of course,[47] and the fact that the witness when last seen was with an agent of the opposite party who bought him railroad tickets is held to be a sufficient reason or showing for its admissibility.[48]

The rule seems to be sufficient if a witness is able to give the substance of the former testimony,[49] and in some states it is sufficient merely to give its effect in either criminal or civil cases,[50] but the substance of both direct and cross-examination must be given by the witness in order to be admissible.[51]

§ 118. Admissibility of Former Testimony. Stenographic notes are also admissible as evidence of the former testimony of the witness. In some states such evidence is made evidence *per se*.[52] Death formerly was the sole condition of admissibility of such evidence and it is still the rule in criminal cases in many jurisdictions. The reporting witness was formerly required to repeat the very words of the testimony of the former witness, but this is so changed that it is now sufficient to give merely the essential words.[53]

The issues in the former case should be identical with those at the present trial.[54] It must be shown that the party against whom the evidence is offered or his privy was a party to the

Co., 68 Iowa 37, 25 N. W. 918; Sullivan v. State, 6 Texas App. 319, 32 Am. Rep. 580.

45—Plano Mfg. Co. v. Darmanter, 56 Ill. App. 258; Howard v. Patrick, 38 Mich. 795; Campbell v. Campbell, 138 Ill. 612, 28 N. E. 1080; People v. Devine, 46 Cal. 45; State v. Nelson, 75 Pac. 505.

46—Boldwain v. St. Louis R. Co., 68 Iowa 37, 25 N. W. 918.

47—Stout v. Cook, 47 Ill. 530.

48—Eagle Mfg. Co. v. Welch, 61 Ga. 444.

49—Cleland v. Huey, 18 Ala. 343.

50—Hutchings v. Corgan, 59 Ill. 70; Small v. Chicago Ky. Co., 55 Iowa 582, 39 Am. Rep. 179; Berson v. Huntington, 21 Mich. 415, 4 Am. Rep. 497; Barnett v. People, 54 Ill. 325; State v. O'Brien, 81 Iowa 88.

51—Aulger v. Smith, 34 Ill. 534; Harrison v. Charlton, 42 Iowa 573.

52—In re Wiltsey, 122 Iowa 423, 98 N. W. 294; Walker v. Walker, 117 Iowa 609, 91 N. W. 908.

53—Marshall v. Adams, 11 Ill. 37.

54—Fricke v. Kabacker, 166 Iowa 494, 90 N. W. 498; Schindler

former trial, that the issue is substantially the same in the two cases and that the witness through the former testimony is able to state it with correctness.

It is also necessary to show a good and sufficient reason why the original witness is not produced either on account of death, or his absence and his whereabouts being unknown, so that his deposition could not be taken. It must further appear that a fair opportunity for cross-examination was given in the former case both in civil and criminal trials. It seems that it is of no consequence that the two hearings were on different indictments or that the form of the charge was different, provided that both arose from the same facts and the source of liability in both instances was the same.[55]

The party offering the evidence either in a civil or criminal case must show that the parties to the suit are actually or constructively the same in both cases. The constitutional right of the accused to be confronted with his witnesses is not infringed by the admission of such evidence.[56]

§ 119. Pleadings Considered as Admissions. The pleadings are not evidence on which a jury can act; at most they are but admissions made by the opposing party, and when put in evidence may then be considered by the jury in the same way that an admission would be.[57] The pleadings in whole or in part, being in the nature of admissions, may be used against the party even if filed in a former suit where the parties were different. Such admissions are subject to qualification and explanation, however. Pleadings may be introduced as admissions of the statements contained therein, although not signed by the party but by his attorney and upon information furnished by the party.[58]

§ 120. Pleadings of the Party as Evidence. The pleadings of a party to an action may be used as competent evidence

v. M. Ry. Co., 87 Mich. 400, 49 N. W. 670.

55—Ballman v. Heron, 169 Penn. 510, 32 Atl. 594; Wilder v. St. Paul, 12 Minn. 192.

56—Mason v. Kellog, 38 Mich. 132; Summons v. State, 5 Ohio 325; Barnett v. People, 54 Ill. 325; State v. Porter, 74 Iowa 623, 38 N. W. 514.

Former suit between same parties for same cause of action which has been dismissed for want of prosecution is competent, being in nature of admission.

Barron v. Burke, 82 Ill. App. 122.

57—Greenville v. O. D. S. S. Co., 104 N. C. 91, 10 S. E. 147.

58—Johnson v. Russell, 144 Mass. 409, 11 N. E. 670; Farr v. Rouillard, 172 Mass. 303, 52 N. E. 444.

against him of any admissions or facts contained therein and are conclusive upon him. Pleadings may be amended with more or less liberality by permission of court, and for this reason the conclusiveness of the matters stated in a pleading are therefore not altogether absolute.

Even where the pleading or a part of it has been withdrawn or amended by the party, it may be used as competent evidence against the party who filed it, but it is subject to such explanation as any other evidence might be. If the pleading of the opposing side is put in evidence it does not estop the party who offers it from denying the statements it contains.[59]

It is not necessary that the whole of the pleading should be put in evidence; the party may offer a portion or a single sentence thereof, provided it is complete in itself sufficiently to convey truthfully the meaning it intended.[60] If only a portion is offered in evidence the whole or as much more as may be sufficient to explain it may be read by the one who filed the pleading.[61]

Except as we have already stated, that a party may read his pleading upon the opening statement to the jury, he is not entitled to put his own pleading in evidence for obvious reasons. The pleadings are for the court and may be read for any purpose of defining the issue without being put in evidence.[62]

§ 121. Conduct of Attorneys, Court or Parties as Evidence for the Jury. No experienced trial lawyer would ever rely exclusively upon the sworn statements made in open court by the witnesses and disregard the many other avenues of information through which conviction may be conveyed to a juror's mind. In fact while the evidence given by witnesses in court is the skeleton or frame work upon which the structure is built, it is often lost sight of by the jury as they look upon some exterior and rather immaterial matter which, in the consideration of counsel, served as mere ornament to the case.

The seriousness of counsel in addressing the jury or the court, the manner in which apparently damaging evidence seems to affect him, the manner and demeanor of the court toward the attorney, whether respectful or not, the appearance

59—Cleveland v. Gray, 148 Ind. 266, 46 N. E. 675; Fogg v. Edwards, 20 Hun [N. Y.] 90.

60—Jones v. Mutual Accident Assn., 92 Iowa 652, 61 N. W. 485.

61—Grattan v. Life Ins. Co., 92 N. Y. 274, 44 Am. Rep. 372.

62—Shepard v. Mills, 70 Ill. App. 72.

of the party or his witnesses, as to whether they seem candid and fair; all these appeal to the jury as strongly as the substance of any testimony.

§ 122. Appearance and Conduct of Witnesses as Evidence. Actions speak louder than words and many a jury has received into its consciousness matters of evidence that the oral testimony failed to convey. The plaintiff, in an action for personal injuries, crippled and lamed, walks to the witness stand and before a word is spoken by him the jury have the full knowledge of what his testimony will be. It has been held proper to permit a plaintiff, though crippled, to walk to the witness stand in an action brought for personal injuries to himself,[63] and in an action for personal injury, the plaintiff may show his wounds to the jury, although the court seemed to hold that to permit a dramatic exhibition of his wounds would be reversible error.[64] In an action for delay in delivering a message announcing the death of a son of the plaintiff, it was held she was not guilty of misconduct in appearing on the witness stand in deep mourning or in giving way to her emotions during her examination when asked about the death of said son.[65]

A witness may be brought in to testify, lying on a cot, and although the sympathies of the jury may be aroused on account of his pitiful condition, the witness has an undoubted right to be present and only the defendant can blame himself therefor on account of his own negligence. In a later part of this chapter will be considered more in detail the exhibition of material evidence to the jury and the allowance of a view by the jury.

§ 123. Experiments, Photographs and Like Evidence. Aside from the testimony to be given orally on the witness stand on the trial or depositions which we have just mentioned, there is a species of evidence equally as good called by some writers "real evidence," such as photographs, experiments made, and exhibits placed in evidence at the trial. Experiments have been held competent where the same conditions exist at the time of the experiment as at the time of the occurrence.[66] Experiments as to the amount of pressure re-

63—City of Minden v. Vedene, 101 N. W. 330 (Neb.).

64—Felsch v. Babb, 101 N. W. 1011 (Neb.).

65—W. U. Tel. Co. v. Shaw, 70 S. W. 58 (Tex.).

66—Fein v. Covenant Mutual Benefit Ass'n, 60 A. 277.

quired to pull the trigger of a revolver have thus been held competent.[67]

It seems that photographs may be introduced in evidence, but these are limited to objects permanent in their nature for some undefinable reason and if necessary the jury may be supplied with a magnifying glass with which to examine them.[68] When it is important that the *locus in quo* of any object be described, a photograph of the same is competent, and views of tracks, streets, buildings, bridges, sidewalks, and other objects permanent in their nature may be shown by this means.[69]

The court in an action for damages for personal injury may within its discretion allow an exhibition of the mutilated limb before the jury,[70] but a dramatic exhibition thereof has been held reversible error.[71]

§ 124. Obtaining Information Outside of Court During the Trial. It is of the utmost importance that a juror's mind should be free from prejudice and bias. Knowledge of any fact, material to the issue, would lead to a reliance upon his own individual conception rather than to giving the evidence produced upon the trial its relative importance and weight. For the same reason, we might state that any observation made by a juror would be misconduct, as where he separates himself from his fellows without authority, and looks at the premises to which the evidence relates. Action of this sort might not necessarily constitute such misconduct as to require the setting aside of a verdict, and yet according to the facts involved, it might.[72] So also, it has been held that individual investigation by a juror, affecting the provable guilt or innocence of the accused, was misconduct, although not always sufficient for reversal.[73]

The foregoing comments upon the personal knowledge of jurors or upon their unauthorized obtaining of such knowledge during the trial are not criticisms upon the conduct of the jury

67—Collins v. P., 194 Ill. 506, 62 N. E. 902.

68—Barker v. Perry, 67 Iowa 148, 25 N. W. 100.

69—Udderzook's Case, 76 Pa 340; Ruloff v. People, 45 N. Y. 213; Barker v. Perry, 67 Iowa 147, 25 N. W. 100.

70—R. Co. v. Grenell, 90 Am. 49; Jefferson Ice Co. v. Zwickoski, 78 Am. 649; Clausen v. R. Co., 173 Ill. 106; Swift v. Rutkowski, 182 Ill. 24, 54 N. E. 1038.

71—Felsch v. Babb, 101 N. W. 1011.

72—Bowman v. Western Fur. Mfg. Co., 96 Iowa 188, 64 N. W. 775.

73—Shissler v. State, 99 N. W. 593.

in properly observing and noticing the conduct of a party in open court during the trial of the case, or the consideration of the conduct, deportment and demeanor of the witnesses while on the stand.[74]

§ 125. **Voluntary Efforts of the Jury to Secure Evidence.** The jury have undoubtedly a right to ask for such evidence as they may require to reach a proper comprehension of the case. A juror, however, is guilty of misconduct who seeks to inform himself after the beginning of the trial relative to the matters in controversy either by questioning witnesses out of court or by viewing and measuring the premises involved, for the reason that all of the evidence upon which the jurors act, should be received by them in open court in the presence of the parties, excepting where otherwise ordered under the limitations of the court. The allowing of a jury to view the premises is within the sound discretion of the court.[75] And it is not improper for the court to state to the jury that they should not examine the place of the accident and should remain away therefrom unless counsel agree they go in a body, in charge of an officer.[76]

§ 126. **Expert Testimony.** Where the knowledge of the jury is not equal to the special demands made by reason of the unusual and complicated matters involved, it should be supplemented by expert testimony, at the request of the jury, though usually given without such request. Expert testimony should not be received in any case as to matters of mere common knowledge.[77] Nor is it admissible to prove the operation of natural laws of general observation,[78] nor is it essential to prove the value of property in almost universal use.[79]

It is held that expert testimony is not necessary to prove the value of personal belongings lost by common carriers.[80] Expert testimony has been held not competent to show the well-known fact that machinery is of a dangerous nature,[81] but

74—State v. Hutchinson, 95 Iowa 566, 64 N. W. 610.

75—Rickenan v. Williamsburg City Fire Ins. Co., 120 Wis. 655, 98 N. W. 968.

76—Pioneer Fireproof Const. Co. v. Sunderland, 188 Ill. 341, 58 N. E. 928.

77—R. Co. v. Smith, 69 Ill. App. 70.

78—Hughes v. Richter, 161 Ill. 411, 43 N. E. 1066.

79—R. Co. v. Jones Furniture Transit Co., 92 Ill. App. 509; Maxwell v. Habel, 92 Ill. App. 513.

80—Hebard v. Riegel, 67 Ill. App. 586.

81—Meyer v. Meyer, 86 Ill. App. 420.

expert testimony as to whether machinery operated in a particular manner was dangerous, is held to be competent.[82]

In the same line of reasoning the court has held that expert testimony as to the cause of a derailment of a train is incompetent where such cause is the main issue in the case.[83]

Before expert testimony can be given to the jury it is requisite that the competency of the expert be first shown to the court,[84] and having shown this, such testimony is entitled to as great, or equal weight, as any other evidence before the jury.[85] It should not be discredited by the court as weak or that the jury are to receive it with caution.[86] It seems, however, that some courts have criticised expert testimony as not of equal weight as other testimony of a more direct nature.[87] To tell the jury that they may disregard the expert evidence and base their verdict on their own knowledge is error,[88] but not where the jury considers it unreasonable in its nature.[89]

It is, also, on the other hand, unfair to give undue prominence and weight to expert testimony.[90] In weighing the relative value of expert testimony as against that of a direct nature the jury is the judge of the credibility of the witness, taking into consideration the skill and scientific attainment of the expert and all other factors which may have a bearing upon the truth or falsity of the evidence.

82—Gundlach v. Schott, 192 Ill. 513, 61 N. E. 332.

83—Roberts v. R. Co., 78 Ill. App. 531.

In Cavaness v. State, 45 Tex. Cr. App. 209, 74 S. W. 908 (909), the court said: "We have repeatedly held that even an expert witness could not testify as to the relative positions of defendant and deceased from the location of the wounds; but we have also held that any witness, whether an expert or not, could testify that a bullet went in at one place on the body and came out at a lower place; that this was a matter of common observation, and did not require an expert to testify thereto. We think the court erred in permitting the witness to testify to the facts as above detailed, since the same indicates that the witness is giving his opinion as to the relative position of the parties at the time the shot was fired."

84—R. Co. v. Blatchford, 81 Ill. App. 611.

85—Rivard v. Rivard, 109 Mich. 98.

86—Atchison Ry. Co. v. Thul, 32 Kan. 355, 4 Pac. 352; Louisville R. Co. v. Whitehead, 71 Miss. 451, 15 So. 890.

87—Jackson v. Adams, 100 Iowa 163, 69 N. W. 427; Eggers v. Eggers, 57 Ind. 461.

88—Kansas City v. Hill, 80 Mo. 523.

89—St. Louis v. Rankin, 95 Mo. 189.

90—Blough v. Parry, 144 Ind. 463, 43 N. E. 560, 32 L. R. A. 309.

§ 127. Hypothetical Questions. A greater latitude is allowed in cross-examination of expert witnesses, than in the case of ordinary witnesses, and the court should not unduly restrict the cross-examination of expert witnesses.[91] Any fact which in the discretion of the court, whether it has been testified to in the case or not, may be assumed in the hypothetical question, provided it is pertinent to the inquiry.[92] It is held, however, that the facts assumed in a hypothetical question must have some support in the evidence.[93]

A hypothetical question should recite the whole, or part, at least, of the supposed facts in the case,[94] and if material facts are omitted, it should be specifically objected to.[95] Such objection should point out the facts which have been improperly omitted, in order that the question may be amended.[96]

The question does not necessarily have to include all the facts in evidence,[97] but if there is no dispute upon the facts, it is proper that the question should be required to embrace them all.[98] The question may embrace all the facts in evidence, or such facts as counsel may see fit to use, and if there is any evidence omitted the opposing party can, upon cross-examination, call attention of the expert to such facts.[99] When all the elements are not embraced in the hypothetical questions, those stated must be correct.

An expert witness cannot be asked in a general question to state his opinion upon all the evidence related at the trial, as this would, in fact, usurp the functions of the jury.[100] An expert can with entire propriety testify to facts as an ordinary witness as well as upon a hypothesis stated in a question, and therefore hypothetical questions may embrace the ordinary testimony of the expert, as well as the testimony of any other witness.[1]

91—Inland Printer Co. v. Economical Half-Tone Sup. Co., 99 Ill. App. 18.

92—W. C. St. R. Co. v. Fishman, 169 Ill. 196, 48 N. E. 447.

93—Hurst v. C. R. I. & P. Co., 49 Iowa 76; Kraatz v. Electric Light Co., 82 Mich. 457, 46 N. W. 787.

94—R. Co. v. Glenny, 175 Ill. 238, 51 N. E. 896.

95—Catlin v. Ins. Co., 83 Ill. App. 43.

96—Catlin v. Traders' Ins. Co., *supra*.

97—Turnbull v. Richardson, 69 Mich. 400, 37 N. W. 499.

98—Davis v. State, 35 Ind. 496.

99—Davidson v. State, 135 Ind. 254, 34 N. E. 972.

100—People v. Brown, 53 Mich. 531, 19 N. W. 172.

1—Joslin v. Grand Rapids Ice & Coal Co., 53 Mich. 322, 19 N. W. 17; Selleck v. Janesville, 100 Wis. 157, 75 N. W. 975, 41 L. R. A. 563.

The expert opinions which may be given upon the trial by other expert witnesses than the one testifying, cannot be incorporated in the hypothetical question which may be asked.[2] Considerable latitude should be allowed by the court in cross-examination of expert witnesses in order to test their knowledge and determine the value of their opinion.[3]

For the same reason that a party may ask of a witness upon cross-examination pertinent questions which would in fact make the witness his own, it is likewise proper to ask an expert hypothetical questions on his cross-examination.[4] Hypothetical questions stated in cross-examination must be based on facts in the evidence and it is improper to assume facts to have been proven.[5] This has no reference, however, to the mere testing of the skill and knowledge of the expert.

§ 128. Scientific and Medical Books as Evidence—Reading of Books to the Jury. Medical books, even though standard, are not proper to be read to the jury for the purpose of proving symptoms of diseases, unless they have been referred to by witnesses and are to be used for the purposes of contradiction.[6] Books of medical or veterinary practice cannot be read to the jury in argument.[7] Statements made in books of science are not competent as evidence for any purpose,[8] being bare statements merely, having no sanction of an oath and not subject to cross-examination.

Books of exact sciences, such as mathematical calculations and not of mere inductive science, may be read in evidence. So, an almanac is admissible to show the time when the moon rises.[9] It is within the sound discretion of the judge to regulate the reading of books to the jury. A reading of part of a

2—Louisville Ry. Co. v. Falvey, 104 Ind. 409, 4 N. E. 908.

3—Chicago & A. R. Co. v. Redmond, 171 Ill. 347, 49 N. W. 541; Eslich v. Mason City & Ft. Dodge Ry. Co., 75 Iowa 443, 39 N. W. 700.

4—Grubb v. State, 117 Ind. 277, 20 N. E. 257; Conway v. State, 118 Ind. 482, 21 N. E. 285.

5—Smalley v. Appleton, 75 Wis. 18, 43 N. W. 826.

6—Bixby v. Omaha, C. B. R. Co., 105 Iowa 293, 75 N. W. 182, 43 L. R. A. 533.

In Scott v. People, 141 Ill. 195, 30 N. E. 329, the court held that where a passage in a medical book has been read to a physician on the stand, and he has been asked if the statements therein agree with his observations, and he has said they do, the passage may be read to the jury in argument.

7—Washburn v. Cuddihy, 74 Mass. 430.

8—North Chgo. Rolling Mill Co. v. Monka, 107 Ill. 340; Brodhead v. Wiltse, 35 Iowa 429.

9—Munshower v. State, 55 Md. 11, 39 Am. Rep. 414.

Supreme Court opinion in argument by counsel, but changing it to correspond with the facts in the case on trial, is held improper,[10] and it has been held proper to refuse permission to read from another opinion of a court to the jury.[11]

Entries in a family Bible are admissible as evidence in matters of pedigree.[12] The minutes of a stenographer, even though certified to by him, are not competent, unless made so by statute, or where the stenographer who transcribed the minutes, testifies that his transcript is correct, or where the stenographer is dead or beyond the jurisdiction of the court.

10—Hughes v. C. M. & O. Ry., 122 Wis. 258, 99 N. W. 902.

11—Stone v. Com., 131 Mass. 438, 63 N. E. 1074; Com. v. Hill, 145 Mass. 305, 14 N. E. 124.

12—Supreme Counsel v. Conklin, 60 N. J. L. 565, 38 Atl. 659, 41 L. R. A. 449.

CHAPTER IX.

OBJECTIONS TO EVIDENCE—CROSS EXAMINATION—IMPEACHMENT—ATTORNEYS, PARTIES AND JUDGES AS WITNESSES.

§ 129. Stating Objections to Evidence. The particular grounds upon which an objection to the evidence is based, should be stated; a general objection omitting to specify the grounds therefor is not sufficient.[1] The use of the words "incompetent, irrelevant and immaterial" is usually considered as comprehensive, but if the evidence is admissible for any purpose, it is held not sufficiently specific.[2]

Incompetent evidence may be objected to at any time,[3] but this does not mean that objections can be made after the submission of the case to the jury, or after argument.[4] The reason for stating the objection with specific particularity is that the opposing party may be apprised of its objectionable features so he may be able to remedy it, if possible. If the

1—McDonald v. Stark, 176 Ill. 456, 52 N. E. 37; Tewalt v. Irwin, 164 Ill. 592, 46 N. E. 13.

2—Chicago & E. I. Ry. v. Holland, 122 Ill. 461, 13 N. E. 145.

3—Day v. Crawford, 13 Ga. 508.

4—Barton v. Gray, 57 Mich. 622, 24 N. W. 638.

grounds are not stated, the opposing counsel has the right to demand them, but if this is not done and the objection seems sufficient to the court, the evidence may be properly refused.

An objection to evidence as being incompetent should specifically point out wherein the incompetency consists.[5] Where the evidence is competent for any purpose it should be admitted and if for any reason it should be restricted in its application this may properly be done by an instruction.[6] The objection that a question is leading must always be specifically made.[7]

§ 130. Offer of Testimony—Statement by Counsel. If a question is raised as to the admissibility of any evidence the party offering it should save an exception to the ruling of the court in excluding it. Before taking an exception, it is considered good practice to make an offer of the evidence which has been objected to, before the ruling is made. It is held that the offer must be made at such a time before the ruling as to give the court an opportunity of knowing what the testimony is sought to be elicited.[8]

To refuse counsel the opportunity to make a statement of what he expects to prove by a particular question, is error, although the evidence may be excluded.[9] If the competency of the witness is brought in question and not merely his testimony, it is not necessary to state the substance of what is expected to be proved by him as it otherwise might be.[10]

The offer of testimony should contain the substance of what is expected to be proven by the witness and should be clear and unequivocal, and must be competent evidence proper for consideration by the jury;[11] and the presence of a witness is necessary in order that the offer of his testimony may be properly made.[12]

5—Sanitary Dist. of Chicago v. Bernstein, 175 Ill. 215, 51 N. E. 720.

6—Mighell v. Stone, 175 Ill. 261, 51 N. E. 906.

7—North Chicago St. R. Co. v. Balhatchett, 86 Ill. App. 60.

In McDonald v. Stark, *supra*, the court held that "it is not sufficient to state a general objection against the admission of secondary evidence without stating specifically that the proper foundation has not been laid."

8—Young v. Otto, 57 Minn. 307, 59 N. W. 199.

9—Maxwell v. Habel, 92 Ill. App. 510; Fidelity & Casualty Co. v. Weise, 80 Ill. App. 499.

10—State v. Thomas, 111 Ind. 515, 13 N. E. 35.

11—Cincinnati Ry. v. Roesch, 126 Ind. 445, 26 N. E. 171.

12—Lewis v. Newton, 93 Wis. 405, 67 N. W. 724.

§ 131. Exclusion of Testimony by Opponent's Admission of the Facts. Should the evidence offered be admitted by the opposing side it need not be given. The court is not bound to take evidence on uncontroverted matters.[13] This method should not be approved too extensively, for the reason that a party has a right to have his evidence given by the witnesses produced and to have the jury receive the benefit of the manner in which the witness testifies to the facts. Aside from this it would be exacting a hardship on the party to demand that his offer, when made, should be so full, accurate and complete, that if admitted by the opposite party, it would be considered equivalent to the giving of the testimony itself on the stand.

"It would be absurd to hold that any party by his bald admissions on a trial could shut out legal evidence," says the Supreme Court of Michigan.[14]

§ 132. Objecting to and Striking Out Evidence. In order to take advantage of the improper admission of evidence as error and to secure a reversal on that ground, such evidence must be objected to at the trial.[15] An objection made after the question is answered comes too late.[16] It must be made before; and, if not, the only proper method is to strike out the answer where not responsive.[17]

When it is not apparent that a question is proper and an objection thereto is sustained, such ruling is held not to be erroneous unless a statement is offered as to the facts expected to be proven by the question.[18] If a party finds answers of a witness in response to his questions, or questions of the opposite side are unresponsive or irrelevant and incompetent, such answers may be stricken out at the discretion of the court, by either party.

All improper and incompetent evidence may be stricken out on motion of the opposing party addressed to the sound discretion of the court, and if the party is unsuccessful in his

13—John Hancock Ins. Co. v. Moore, 34 Mich. 41.

14—Kimball Mfg. Co. v. Vroman, 35 Mich. 310, 24 Am. Rep. 558.

15—Cleveland C. C. Ry. Co. v. Strong, 66 Ill. App. 604; Scott v. C. M. & St. P. Ry., 78 Iowa 199, 42 N. W. 645.

16—Swigart v. Willard (Ind.), 76 N. E. 755.

17—Hebert v. Hebert, 104 N. W. 911 (S. D.).

In Davis v. Holy Terror Mining Co., 107 N. W. 374, the court held that when an answer is not responsive to the question it should be stricken out on motion.

18—Judy v. Buck, 82 Pac. 1104.

motion, the jury should be instructed to disregard such evidence.[19]

§ 133. Must Remain Hostile to Evidence Objected to. A party who has objected to certain evidence should remain hostile to it or else his objection will be considered waived. If he should afterwards introduce the same evidence, either confirming or explaining it, all his objections would be waived.[20] If improper evidence has been objected to and the objection is overruled, it is held that the objecting party has the right to put matter in evidence which relates to the same point although equally improper.[21]

It is proper to cross-examine a witness upon the evidence to which the party has objected when his objection is overruled, although this is dangerous practice and liable to preclude the party from maintaining his objection.

§ 134. Latitude of Cross-Examination. The cross-examination of witnesses has for its object to discover the extent or limitation of their knowledge. Cross-examination should, if possible, follow the direct immediately so the connection and real significance of the testimony may be observed, unless otherwise ordered in the court's discretion. If cross-examination is waived it is still within the court's discretion to allow the party at a further stage in the proceedings to recall the witness and subject him to cross-examination.

The question arises as to whether on cross-examination a party may question such witness merely as to matters called out upon his direct examination, or may go into the whole issue. Upon this question the courts hold a party has no right to introduce his own case to the jury by cross-examination before his adversary has closed.[22] The court has the right to allow the cross-examination considerable latitude and in the use of its sound discretion it has been held proper in some jurisdictions to allow a party to elicit matters on cross-examination which are in support of his own side of the case.[23] Wherever the opposing party is a witness the courts are more

19—Brandon v. L. S. & M. S. Ry. Co., 8 O. 642.

20—Schroeder v. Michel, 98 Mo. 43, 11 S. W. 314.

21—Spaulding v. Chicago & K. C. Ry., 98 Iowa 205, 67 N. W. 227.

22—W. & W. Mfg. Co. v. Barrett, 172 Ill. 610, aff'g 70 Ill. App. 222, 50 N. E. 325; Bulliss v. C. M. & St. P. Ry. Co., 76 Iowa 680, 39 N. W. 245; Bell v. Prewitt, 62 Ill. 361. (Case reversed for allowing cross-examination at large.)

23—McGuire v. Hartford F. Ins. Co., 40 N. Y. Supp. 300.

inclined to allow considerable latitude in his cross-examination.[24]

§ 135. Cross-examination on the Whole Issue, Federal Rule. It would seem that a witness once offered by the opponent, if a witness for any purpose, is so for all purposes, and may be cross-examined as to any matter in the issue. This is the rule of the common law and in use in the courts of England, and to some extent in the United States.[25]

Chief Justice Story in one of his decisions denied this broad rule and laid down what is known as the Federal Rule, which limits the right of cross-examination strictly to the matters brought out in chief.[26] The primary obligation of the oath of a witness is to elicit the whole truth, and why should not the entire knowledge of the witness in regard to the controversy be exhausted? Why call the witness later, on behalf of the other party when he has already been vouched for as a witness?

It is urged that this method would cause the party who first called him to lose his right of cross-examination but this would not necessarily follow for his re-direct examination would serve the same purpose.

§ 136. Same Subject—Criticisms. It is urged that by this method a party could secure the benefits of testimony from a witness and yet impeach the same witness, but this objection is not of great weight for the reason that a party may in many instances do this very thing, and aside from this, it must be remembered that the opposing party calling the witness is the one who has primarily vouched for his credibility. The main object is to elicit the whole truth concerning the transactions but partially explained, and where the whole truth would cause them to appear in a different light, only justice would be served thereby.

Whenever an entire transaction is in issue, evidence which conceals a part of it is imperfect and does not comply even with the obligation of the oath. The witness is sworn to tell the truth, the whole truth and nothing but the truth. And any question, therefore, which fills up omissions made either by accident or design would seem to be proper upon cross-

24—State v. Allen, 107 N. C. 805, 11 S. E. 1016; News v. Butler, 95 Ga. 559, 22 S. E. 282.

25—Fulton Bank v. Stafford, 2 Wend. N. Y. 483.

26—Phila. & R. Co. v. Stimpson, 14 Pet. (U. S.) 448; Wills v. Russell, 100 U. S. 621; 1 Greenl. Ev. 445; Stafford v. Fargo, 35 Ill. 481; Mask v. State, 32 Miss. 405

examination. To permit a party to glean out particular facts which would cause a false account in his behalf and to bar the opposing side from sifting the testimony of the witness by which this can be detected is neither right nor proper.

No one should be compelled to make his adversary's witnesses his own in order to explain a transaction which has but partially been gone over by the opponent.[27] A difference is to be noticed as to whether the answer desired on cross-examination is a part of the case of the plaintiff or the defendant.

§ 137. **Same Subject—Leading Questions, When Proper.** It is also urged that this method would permit leading questions to be asked, but this objection is not of much validity for the reason that the witness is called by the opponent and is necessarily considered as hostile. Leading questions may always be asked of a hostile witness and that even where the witness has been offered by the party examining him.

A witness who appears eager and anxious to help the opposing side and shows a partisanship in the case may not be asked leading questions on cross-examination, even where he is called by the opposing side. The state of mind of a witness is the only rule to guide as to whether a leading question may be asked or not.

§ 138. **Conduct of Cross-Examination.** In order that there may be a cross-examination at all there must of necessity be a direct examination of some kind, thus leaving on record some testimony which may be discredited. There can be no cross-examination where a witness has been merely sworn or been offered as a witness but no testimony was given, or if it was given, when the same has been stricken out by order of court.

The conduct of cross-examination is within the discretion of the court and unless the rights of parties have been prejudiced, is not reviewable in an upper court. A denial of the right is error and any abridgment which would amount in any measure to its denial would also be error justifying a reversal.[28]

Such conduct of the trial court as may unduly hinder the defendant, trying to cross-examine a witness, is held to be

27—Chandler v. Allison, 10 Mich. 472.

28—Duquesne Mfg. Co. v. Williams, 79 Ill. App. 277.

improper.[29] Great latitude should be allowed in a criminal case in the cross-examination of the prosecuting witness,[30] and in fact in cross-examination of any of the state's witnesses. However, it is held that the limit and extent of cross-examination, especially in civil cases, is largely within the discretion of the trial court.[31] The manner of examining a witness is entirely within the discretion of the court, governed, in a measure, by the demeanor of the witness during his examination.[32]

§ 139. Witnesses as to Character, Cross-examination of. The jury may be made acquainted with the past life and character of a witness through cross-examination within reasonable limits as the court in its discretion may allow, and the putting of a question to a witness which involves an accusation of disgrace or dishonor, is not error.[33]

Witnesses to character or reputation are allowed to be cross-examined most liberally in order to test the nature and grounds of their knowledge. Such witnesses may be cross-examined and asked if there are not other facts contradicting the evidence they have given. The witness may be asked if he has not heard reports of good character where he has testified to the bad reputation of the witness,[34] but questions of this nature must be as general as the questions asked him on the direct. For this reason the witness to the bad moral character of another cannot be asked whether he has heard *certain named persons* state that his character was good; it must refer to the general character in the neighborhood.[35]

A witness to the reputation of another may be cross-examined as to the grounds and sources of this information and may be asked the names of the persons from whom he received it and what they said.

§ 140. Impeachment as to Character, Questions as to Specific Acts. Whether questions relating to specific acts which tend to discredit a witness or impeach his moral character may be asked or not, is variously held by the different courts. It

29—Whiteman v. People, 83 Ill. App. 375.

30—Davids v. People, 192 Ill. 190, 61 N. E. 537.

31—R. Co. v. Rathburn, 190 Ill. 572, 60 N. E. 817; Harty v. Smith, 74 Ill. App. 196.

32—Brown v. Burris, 8 Mo. 26.

33—Beebe v. Knapp, 28 Mich. 72; Leland v. Kauth, 47 Mich. 508, 11 N. W. 292; McBride v. Wallace, 62 Mich. 454, 29 N. W. 75; Knickerbocker v. Worthing, 101 N. W. 540.

34—Hutts v. Hutts, 62 Ind. 240.

35—State v. Allen, 100 Iowa 7, 69 N. W. 274.

seems that the main or ultimate fact may be inquired into and not the details thereof, nor as to matters entirely collateral and immaterial. To ask a witness if he has been convicted of a crime is entirely proper even without producing the record.[36] In the state of New York an attorney may properly be asked whether he was disbarred at any time.[37]

An expulsion from a church or a discharge from the public service is not a proper matter for questioning for the reason that these are not as decisive as a judicial hearing might be of the guilt or innocence of the party or proof of his moral character.

Questions concerning the fact of having been arrested or indicted are held improper,[38] although in some states it has been held that such questions may be asked.[39] It would seem that the impropriety of asking such a question would be apparent for the reason that the fact of arrest or indictment is not conclusive in the least sense of moral turpitude or guilt; it is a mere accusation at the most and entirely consistent with innocence.

§ 141. Impeachment in General. Impeachment of witnesses cannot be accomplished without first laying proper foundation therefor.[40] Nor can it be accomplished by first showing statements he has made out of court, and then calling witnesses to contradict them.[41] The impeachment of a witness cannot be accomplished by contradicting him as to immaterial matters.[42] The use of a written statement signed by the witness is not proper for the purpose of impeachment unless a proper foundation is first laid.[43] It is held that the impeachment of a witness cannot be made by party calling him, nor can the effect of his testimony be overcome by mere denial of its truthfulness by counsel.[44]

36—Hanners v. McClellan, 74 Iowa 318, 37 N. W. 389; Handlin v. Law, 34 Ill. App. 84.

37—People v. Reavey, 38 Hun 418; People v. Dorthy, 156 N. Y. 237, 50 N. E. 800. (Right denied and held that witness could not be required to state upon what disbarment rested.)

38—State v. Brown, 100 Iowa 50, 69 N. W. 277.

39—State v. Greenburg, 59 Kan. 404, 53 Pac. 61, 41 L. R. A. 349.

40—Hones v. Cline, 84 Ill. App. 429.

41—Vierling, McDowell & Co. v. Iroquois Furnace Co., 68 Ill. App. 644, affirmed 170 Ill. 189.

42—R. Co. v. Finnan, 84 Ill. App. 390; R. Co. v. Southwick, 165 Ill. 495.

43—Himrod Coal Co. v. Adack, 94 Ill. App. 5.

44—R. Co. v. Cohen, 66 Ill. App. 320.

§ 142. **Presiding Judge as a Witness.** A judge may be a witness on the trial at which he presides but usually only upon some formal and undisputed point.[45] In any other event he should refuse to act further and the case should be tried before another judge. This might work a hardship upon the parties by forcing a postponement of the trial but it seems the only way to secure justice with impartiality.

The practice of allowing the judge to testify in a case is certainly reprehensible for if one party is entitled to his testimony the other might be equally so. On a motion to direct a verdict the judge would, of necessity, be forced to pass upon his own evidence and the rights of the litigants might be prejudiced in that event. Aside from this the judge would of necessity be compelled to pass upon the objection made and the admissibility of his own answers while acting as a witness, and to a great extent the jury would be influenced to attach more weight to the testimony of the judge than to any other witness. The only safe rule for the party desiring to have the judge as a witness is to have another judge preside at the trial of the case.[46]

Even if a judge is able to pass upon the admissibility of his own evidence and the objections made thereto, it would detract from the dignity of the judicial office to do so. By taking the character of a witness he appears to be partisan and arouses the distrust of the party against whom he testifies, which he cannot do and maintain the strict impartiality which the law exacts.[47]

§ 143. **Attorneys in the Case as Witnesses.** An attorney is undoubtedly competent as a witness for his client, yet this is more to be shunned than the practice of allowing the judge or juror to act as a witness. It is unseemly for an attorney to state on oath those things upon which he must afterward comment in argument.[48] The reason for this is that the in-

45—The judge of the court is a competent witness for either party and may be sworn on the trial. But in such case it is his discretion to order the trial postponed or suspended and to take place before another judge. Code of Iowa, Sec. 4610.

46—Maitland v. Zanga, 14 Wash. 92, 44 Pac. 117.

47—Rogers v. State, 60 Ark. 76-86, 29 S. W. 894, 31 L. R. A. 465.

48—R. v. Brice, 2 B. and Add. 606.

In State v. Seymour, 7 Idaho 548, 63 Pac. 1036, the court held that county attorneys could be compelled to testify for the defendant in criminal cases, but these instances are exceptional.

terest and partisanship which he has in favor of his client through his relationship causes him to become identified in feeling, if not in interest, with his client.[49] Not only this, but an attorney loses the respect and confidence of the public when he becomes a witness upon his own case. The jury may be unduly impressed with the weight of the argument where the attorney is able on account of having been a witness to weave in his own personal opinion and evidence.

It is sometimes necessary perhaps that an attorney testify for his client, but only in cases of the most pressing necessity should the courts countenance such practice.[50] And in cases where the evidence is indispensable, counsel should be recommended by the court to withdraw from the case.[51] Attorneys are not compellable to testify for their clients although competent,[52] and an attorney has been held to be competent as a witness for his client even though he acts on a contingent fee.[53] An attorney is allowed to testify as a subscribing witness to a will although it is said that the courts always discountenance this practice.[54] There is really no good reason for criticising such practice, as the probate of a will is more of a formal and ministerial duty than anything else.

In regard to the testimony of an attorney for his client on a mere matter of reckoning of interest the Supreme Court of Illinois said: "We are not altogether in favor of it but we have no law or rule of practice against it."[55]

In one case the court spoke of it as a highly indecent prac-

49—Cox v. Williams, 5 Mart. 139.

50—Smith v. Sebree, 2 Iowa 327; Spencer v. Kinnard, 12 Tex. 180, 188.

51—Morgan v. Roberts, 38 Wash. 65.

52—Willas v. West, 60 Ga. 613.

53 Central Branch U. P. R. Co. v. Andrews, 41 Kan. 370, 377, 21 Pac. 276, 3 L. R. A. 631.

54—Drach v. Kamberg, 187 Ill. 385, 58 N. E. 370.

55—Smith v. Sebree, 2 Iowa, 327; Stratton v. Henderson, 26 Ill. 69, 73, 76.

In Ross v. Demoss, 45 Ill. 447, 449, the court said that "An attorney occupying the attitude of both witness and attorney for his client subjects his testimony to criticism if not suspicion; but where the half of valuable farm depends upon his evidence, he places himself in an unprofessional position, and must not be surprised if his evidence is impaired. While the profession is an honorable one, its members should not forget that even they may so act as to lose public confidence and general respect."

Sandford. J., in Little v. Keon, 1 Code Reporter (N. Y. Super.) 4, the court said that "Counsellors of standing and character will never, except in extreme cases, present themselves before a jury as witnesses in their own causes on liti-

tice for an attorney to cross-examine witnesses, to address the jury and to give testimony himself, contradicting witnesses, "though his testimony is sometimes indispensable and no law forbids it."[56]

Judge Lewis says that "in the course of twenty-five years' experience I have seldom known an attorney received as a witness for his client touching a disputed point without some loss of reputation and without bringing some reproach upon the profession to which he belongs and upon the court of which he was an officer. Existing prejudices, whether just or not, point to the exclusion of such testimony as indispensable to the usefulness of all who are officially connected with the administration of justice."[57]

The Western Law Journal in a very able article on this subject stated that "the attorney's exclusion should rest on peculiar grounds, he should be rejected, not for the protection of the opposite party, but for his own; not because his integrity may be exposed to temptation, but because it will be disposed to suspicion."[58]

An attorney can hardly testify without bias or favor and tell the truth of the matters he has heard or seen while zealously espousing the interests of his client. For this reason the characters of advocate and witness should be separate and for the further reason that the jury will then have no difficulty in separating statements which they have heard from the attorney as witness from those he afterwards makes in his argument to the jury.[59]

It has even been held proper for the court to prohibit an attorney from arguing to the jury on a case in which he has been a witness.[60] This rule is considerably different where the party himself tries the case for the reason that a party is always entitled to try his own case and to be a witness.[61]

gated questions, and in such cases only because of some unforeseen necessity. Those gentlemen of the bar who habitually suffer themselves to be used as witnesses for their clients soon become marked, both by their associates and the courts, and forfeit in their character more than will ever be compensated to them by success in such clients' controversies."

56—Frear v. Drinker, 8 Pa. St. 520.

57—Mishler v. Baumgardner, Pa. Com. Pl. 1847; 1 American Law Journal, N. S. 304, 308.

58—5 Western Law Journal, 457.

59—Stones v. Byron, 4 Doll. & L. 393.

60—Voss v. Bender, 32 Wash. 566, 73 Pac. 697.

61—Tresher v. Bank, 68 Conn. 201, 36 Atl. 38.

§ 144. Failure of the Parties to Testify—Presumptions. The parties have a right but are not bound to testify as witnesses upon the case in their own behalf. There is a presumption which arises in civil cases from a failure to testify, although this may be rebutted by proof of adequate reasons for so declining.[62] The failure of a party to testify in regard to material matters in his case of which he has a special full knowledge raises a presumption that he declines to testify because the truth would militate against his contention.[63]

For this reason, also, the failure of a party to call a witness whom he may have, possessing peculiar knowledge concerning the case and to examine such witness concerning the facts within his special knowledge amounts almost to a presumption that the testimony of that witness would not sustain the contention of the party. This would be especially true if such a witness was favorable to the party's contention and he made use of witnesses relative to that particular matter in dispute, who were less familiar with the case than this particular witness.[64]

§ 145. Parties as Witnesses, Subject to Criticism. The testimony of a party to a suit is open to criticism on the same ground that the testimony of any interested witness would be. The Supreme Court of Illinois has approved an instruction to the effect that "while the law permits the plaintiff in this case to testify in his own behalf, nevertheless the jury have the right in weighing his evidence to determine how much credence is to be given him and to take into consideration the fact that he is the plaintiff and interested in the result of the suit."[65] "Had the suit been against a natural person," says the court in comment, "and had both plaintiff and defendant testified, it should have been so drawn that it would apply to either party without pointing out either." As it was, the refusal of the above instruction was held reversible error.

62—Princeville v. Hitchcock, 101 Ill. App. 588; Cramer v. Burlington, 49 Iowa 213.

63—Stock Exchange v. Board of Trade, 196 Ill. 396, 63 N. E. 740; Cole v. Lake Shore Ry., 81 Mich. 156, 45 N. W. 983.

64—Princeville v. Hitchcock, 101 Ill. App. 588; Stock Exchange v. Board of Trade, *supra;* Mantonya v. Reilly, 83 Ill. App. 275.

65—Street Ry. v. Dougherty, 170 Ill. 379, 48 N. E. 1000; Street Ry. v. Mayer, 185 Ill. 336, 56 N. E. 1058; Street Ry. v. Otis, 192 Ill. 514, 61 N. E. 459; Chicago & E. I. Ry. v. Burridge, 211 Ill. 9, 71 N. E. 838; Feary v. Met. St. Ry., 162 Mo. 75, 62 S. W. 452; Hess v. Lowrey, 122 Ind. 225, 23 N. E. 156, 7 L. R. A. 90.

CHAPTER X.

VIEW AND INSPECTION BY THE JURY.

§ 146. When Permitted—Illustrations. It is a common practice for the parties, especially in actions for personal injuries, to submit their injuries to the jury for inspection and this practice is approved by many courts.[1] This practice rests largely in the discretion of the trial court and where the exhibition may be unseemly or dangerous to health it may properly be refused. An exhibition of an injured member of one of the parties is held to have been properly refused by the trial court in its discretion.[2]

An exhibition of an injured leg to the jury has been held to rest in the sound discretion of the trial court, who may decline to compel the removal of salve from the wound, so that it may be better observed.[3] So, also, is it within the discretion of the court to permit the plaintiff to show his injuries to the jury in an action for criminal assault.[4]

The torn clothing which the plaintiff wore at the time of the injury may be placed on exhibition before the jury for their inspection.[5] And it has also been held proper to allow the

1—Mulhada v. Brooklyn, 30 N. Y. 370.

2—Grand Lodge Brotherhood of R. Trainmen v. Randolph, 186 Ill. 90, 57. N. E. 882.

3—Swift & Co. v. O'Neil, 88 Am. Rep. 168.

4—Barker v. Perry, 67 Ia. 146, 25 N. W. 100; Hall v. Manson, 68 N. W. 922; L. N. A. & C. Ry. Co. v. Wood, 113 Ind. 548, 14 N. E. 572, 16 N. E. 197; Mulhada v. Ry. Co. *supra;* Hatfield v. Ry. Co., 33 Minn. 130, 22 N. W. 176.

5—Tudor Iron Works v. Weber, 129 Ill. 535, 21 N. E. 1078.

plaintiff, in an action against a carrier for loss of goods, to show to the jury similar articles.[6] The weapon used by the accused in a criminal assault, may be shown to the jury;[7] so also tools used in the commission of a burglary,[8] and surgical instruments used for illegal purposes, such as procuring abortions, under an indictment for such offenses,[9] may all be shown to the jury.

The jury, as at common law, may be permitted to take a view or not, as, in the discretion of the court, a view may be deemed proper or necessary to enable the jury to understand and apply the evidence, though not a matter of right.[10]

§ 147. Power to Compel an Exhibition of the Body Against a Party's Will. The question, however, of the power of the trial court to compel an exhibition or allow an examination of the body of one of the parties against his will seems to be in a state of confusion and uncertainty. A view by the jury at common law was undoubtedly sanctioned but in what particular cases is not altogether clear, neither is the extent of the court's authority entirely clear. The Supreme Court of Minnesota held that the trial court in an action for personal injuries might compel the performance of some physical act before the jury so that the extent of his injury could be seen. The court said: "As the object of all judicial investigation is, if possible, to do exact justice and obtain the truth in its entire fullness, we have no doubt of the power of the court, in a proper case, to require the party to perform a physical act before the jury that will illustrate or demonstrate the extent or character of his injuries."[11]

§ 148. Inviolability of Person—Criticisms. There can be no sound objection to allowing the jury to see the objects with which the testimony is concerned in order that a clearer understanding may be had[12] and if a party may do so at his option there can be no real reason against compelling him to make such disclosures at the request of his opponent.[13] It

6—Am. Exp. Co. v. Spellman, 90 Ill. 455; Jupitz v. People, 34 Ill. 516.

7—Wyman v. State, 56 Ga. 113; State v. Mordecai, 68 N. C. 207.

8—People v. Larned, 3 Seld. 455.

9—Commonwealth v. Brown, 121 Mass. 69.

10—Vane v. Evanston, 150 Ill. 616.

11—Hatfield v. Ry. Co., 33 Minn. 130, 22 N. W. 176.

12—Butler v. Ricketts, 6 Iowa 92.

13—Hadfield v. Railway Co., *supra.*

is urged that the inviolability of the person is invaded thereby, but the duty to bear witness to the truth by whatever mode of expression may be appropriate includes the duty to exhibit the physical body as far as the truth requires it.

As the Supreme Court of Iowa has well stated: "Whoever is a party to an action in a court, whether a natural person or a corporation, has a right to demand therein the administration of exact justice. This right can only be secured and fully respected by obtaining the exact and full truth touching all matters in issue in the action. If truth be hidden, injustice will be done. The right of the suitor, then, to demand the whole truth is unquestioned; it is the correlative of the right to exact justice. . . . To our minds the proposition is plain that a proper examination by learned and skilful physicians and surgeons would have opened a road by which the cause could have been conducted nearer to exact justice than by any other way."

"The plaintiff, as it were, had under his own control testimony which would have revealed the truth more clearly than any other that could have been introduced. The cause of truth, the right administration of the law, demand that he should have produced it. . . . It is said that the examination would have subjected him to danger of his life, pain of body, and indignity to his person. The reply to this is that it should not; and the court should have been careful to so order and direct. . . . As to the indignity to which an examination would have subjected him, as urged by counsel, it is probably more imaginary than real. An examination of the person is not so regarded when made for the purpose of administering remedies; those who effect insurance upon our lives, pensioners for disability incurred in the military service of the country, soldiers and sailors enlisting in the army and navy, all are subjected to rigid examinations of their bodies; and it is never esteemed a dishonor or indignity. . . . If for this purpose (to show the nature of the injury) the plaintiff may exhibit his injuries, we see no reason why he may not, in a proper case and under like circumstances be required to do the same thing for a like purpose upon the request of the other party."[14]

14—Schroeder v. R. Co., 47 Iowa 375-379.

In Hess v. Railroad Company, 7 Pa. Com. Pl. 565, the court said: "The plaintiff complained of an injury to the spine and defendant asked for an order of physical examination by means of electricai

§ 149. **Enforcement by Penalties.** The Supreme Court of Minnesota lays down the rule that while a party cannot be compelled to submit to a personal examination, he must either submit thereto or have his action dismissed.[15] In Wisconsin the courts have upheld the granting of an order for the inspection and examination of the opposing party by medical experts,[16] but the court refused to grant an order for a second examination where the plaintiff had submitted to one examination by X-ray process and had been burned.[17] The rule seems to be in this state that an examination cannot be required as a matter of right but is within the court's discretion.[18]

Aside from the penalty above stated of dismissing the party's case upon his refusal to submit to an examination, a proceeding in contempt might be employed as an alternative penalty. The exhibition of the body need not be directly to the court, first because the jury could often not comprehend the appear-

test. To grant the order prayed for is but to apply the principle of allowing the inspection of writings. The object of a trial is that substantial justice may be done between litigants. If a defendant is denied the reasonable opportunity of testing the truth of plaintiff's allegations who alleges an injury which can only be discovered upon an examination by experts, courts may be applied to and relied upon to assist in fraudulent and unjust recoveries upon the testimony of plaintiff and witnesses of his own selection, whose only knowledge may be derived from declarations made by the plaintiff for the purpose of manufacturing evidence in his own favor. To permit such a practice would be to encourage perjury. On the other hand, if the claim is meritorious, if he has sustained injuries complained of, he has nothing to fear from the most searching examination."

15—Wanek v. Winona, 78 Minn. 98, 80 N. W. 851.

In this case the court said as follows:

"The trial court has power to order a personal inspection and to require the plaintiff to submit under penalty of having his action dismissed. The right to possession and control of the person is no more sacred than the cause of justice. When a person appeals for justice tendering an issue as to his own personal condition, he impliedly consents in advance to make any disclosure necessary to be made in order that justice may be done. No one claims that he can be compelled to submit but he must either submit or have his action dismissed. Any other rule in personal injury cases would result in a denial of justice to the defendant and leave him at the mercy of plaintiff's witnesses."

16—White v. R. Co., 61 Wis. 536, 21 N. W. 524.

17—Boelter v. Ross Lumber Co., 103 Wis. 324, 79 N. W. 243.

18—O'Brien v. LaCrosse, 99 Wis. 421, 40 L. R. A. 831, 75 N. W. 81.

ances without expert explanation and secondly because the public exposure might be unnecessarily embarrassing.

§ 150. Compelling Defendants in Criminal Case to Submit to Tests for Purposes of Identification. In the Supreme Court of the United States the court in discussing this question, used the following language:

"No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process commanding such an exposure or submission was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons and upon ancient practice coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country."[19]

In North Carolina it was held error to allow the state to offer a negro defendant to the inspection of the jury in order that they could see that he was within the prohibited degrees. Apparently the defendant was in the court room but in a place where the jury could not see him.[20] The same court later held that it was no violation of the constitutional right of the defendant to allow an officer to testify that he had compelled the defendant to put his shoe in a track or foot print, for the purpose of seeing whether it would fit or not.[21]

In Tennessee it was held to be error prejudicially influencing the jury to demand that a prisoner put his foot in a certain pan of soft mud brought in before the jury in court for the purpose of identification.[22]

Examination of the urine and bladder by catheter insertion refused.

19—Union Pacific R. Co. v. Botsford, 141 U. S. 250, 11 Sup. 1000.

20—State v. Jacob, 5 Jones law (N. C.) 239.

21—State v. Graham, 74 N. C. 646; Day v. State, 63 Ga. 667. But see O'Brien v. State, 25 N. E. 138; State v. Garrett, 71 N. C. 95, and State v. Ah Chuey, 14 Nev. 79.

22—Stokes v. State, 6 Bax. (Tenn.) 619.

§ 151. Inconvenience, Shame, Risk of Health and Similar Criticisms Discussed—Rule in Illinois. This question of the power of the court to order an inspection of the body of one of the parties against his will, seems to have been settled in some courts in certain kinds of actions, but as to others, it is still in confusion. That the court has power in the exercise of sound discretion to direct such examinations, in actions for personal injuries, is upheld by the decisions of many courts, but where no sufficiently valuable evidence can be reasonably expected to be obtained from it or where the inconvenience, shame and risk to health would be considerable, it seems that the court may properly refuse such requests.

The courts do not consider the matter of inconvenience or shame involved as the absolute criterion for refusing an examination, however, as the Supreme Court of Alabama has said: "An examination should not be denied merely because the party is a young woman of delicate and refined feeling and nervous temperament, especially when she has already submitted to several examinations by her own physicians and this examination would have no injurious results."[23]

"Justice should not be sacrificed to notions of delicacy. The attainment of justice is of greater importance than mere personal consideration," is the language used by the Supreme Court of Washington in a case involving this question.[24]

In New York the Supreme Court held that a forcible examination of a female prisoner to determine whether she had delivered a child recently, was a violation of her constitutional privilege.[25] So also in Indiana the court said: "One should not publish and circulate slanderous charges against a young unmarried female, and when called on to prove them, ask the court to aid in the search for evidence by ordering and subjecting her to an indelicate examination of her person, with

23—Ala. G. S. R. Co. v. Hill, 90 Ala. 71, 8 S. Rep. 90, 9 L. R. A. 442.

Where the court says: "It is said that it is abhorrent to the principles of liberty to compel a party to submit to a personal examination; that it invades the inviolability of the person is an indignity involving assault and an impertinence to which a modest woman would not subject, but justice should not be sacrificed to notions of delicacy. The attainment of justice is of greater importance than mere personal consideration."

24—Lane v. R. Co., 221 Wash. 119, 57 Pac. 367, 46 L. R. A. 153.

25—People v. McCoy, 45 How. Pr. (N. Y.) 216.

the hope of obtaining some information advantageous to the defendant and call upon the court as a means of humiliating her some more.''[26]

§ 152. Examination by Surgeon or Commission of Physicians and Surgeons. The Supreme Court of Illinois was divided upon the question of whether a view could be ordered against the objection of a party in any case in which this was not provided for by statute,[27] the majority, however, being on the side of its propriety.

It is well settled, however, in the latter state that the court possesses no power to require the plaintiff in an action for personal injury to submit to a personal examination by a commission of physicians or surgeons against his will.[28] The court may, however, in its discretion in an action for damages for personal injury permit a surgeon to make an examination of the plaintiff even in the presence of the jury.[29]

26—Kern v. Bridewell, 119 Ind. 226, 21 N. E. 664.

27—Springer v. Chicago, 135 Ill. 552, aff., 37 Ill. App. 206, 26 N. E. 514.

28—St. Louis Bridge Co. v. Miller, 138 Ill. 465, aff'g 39 Ill. App. 366, 28 N. E. 1091; Joliet St. Ry. Co. v. Coll., 143 Ill. 177, aff'g 42 Ill. App. 41, 32 N. E. 389; Pe. Dec. & Ev. Ry. Co. v. Rice, 144 Ill. 227, aff'g 46 Ill. App. 60, 33 N. E. 951; Beardstown v. Smith, 150 Ill. 169, aff'g 52 Ill. App. 46, 37 N. E. 211.

29—Lanark v. Dougherty, 153 Ill. 163, 38 N. E. 892.

CHAPTER XI.

INSTRUCTIONS IN GENERAL—FORMS AND REQUISITES—STATUTORY PROVISIONS OF THE VARIOUS STATES.

§ 153. Common Law Practice as to Instructions—Statutory Modifications. In the orderly and regular progress of a cause before a jury, in courts where the common law practice prevails, after the cause has been argued by the counsel on both

sides, the judge proceeds to charge the jury orally, explaining to them the nature of the action and of the defense, and the points in issue between the parties, recapitulating the evidence which has been produced upon both sides, and remarking upon it when he deems it necessary or desirable, and directing or instructing the jury on all points of law arising upon the evidence; or, to quote the words of Chitty: "It is the practice for the judge at *nisi prius* not only to state to the jury all the evidence that has been given, but to comment upon its bearing and weight, and to state the legal rules upon the subject and their application to the particular case, and to advise them as regards the verdict they should give."

This common law practice, in many of the states, has been changed by statute, so as to require the court to instruct the jury as to the law of the case only, and, either peremptorily or at the request of either party, to reduce his charge to writing. The general character and scope of these changes in the common law practice will appear from the following statutory provisions of some of the states:[1]

Alabama.—"The court may state to the jury the law of the case, and may also state the evidence when the same is disputed, but shall not charge upon the effect of the testimony, unless required to do so by one of the parties.

"In all civil and criminal cases, the judge must charge the jury in writing if the charge is required to be so given by either party, and notice of such requisition is given after the testimony is closed, and before the argument to the jury is commenced.

"Charges moved for by either party must be in writing, and must be given or refused in the terms in which they are written; and it is the duty of the judge to write 'given' or 'refused' as the case may be, on the document, and sign his name thereto, which thereby becomes a part of the record, and charges which are given must be taken by the jury with them on retirement, and those refused must be retained by the clerk. All instruments of evidence and depositions read to the jury may be taken out by them on their retirement."—Secs. 3326-7-8-9, Chapter 91, Code of Ala., 1896, Vol. 1.

Arizona.—"Before the argument of a cause the judge may, in open court, deliver a charge to the jury on the law of the case. The charge shall be in writing, unless waived, and signed by the judge. The charge shall not comment on the weight of evidence, but shall instruct

1—The court has the power under the common law to sum up or state the evidence in its charge to the jury, but this is largely discretionary with the court. Wright v. Cent. Ry. & B. K. G. Co. 16 Ga. 46.

the jury as to the law arising on the facts, and the charge shall submit all controverted questions of fact solely to the decision of the court.

"Either party may, before the charge is given, present to the court, in writing, such instructions as he desires to have given to the jury, and for this purpose a reasonable time therefor shall be given. The court shall pass upon the same, and either give or refuse the same as asked; if given, the judge shall, on the margin of such instructions, write the word 'given' in ink and sign his name thereto in ink; and if refused, he shall, in like manner, write the word 'refused,' and sign his name thereto."—Secs. 1407-8-9, pages 449-450, Chap. 12, Rev. Stat. of Ari., 1901.

Arkansas.—"Judges shall not charge juries with regard to matters of fact, but shall declare the law, and in jury trials shall reduce their charge or instructions to writing on the request of either party."—Sec. 23, Art. 7, Constitution of Ark., same provision as in I. T.

California—Civil.—"In charging the jury, the court may state to them all matters of law which it thinks necessary for their information in giving their verdict; and if it state the testimony of the case, it must inform the jury that they are the exclusive judges of all questions of fact. The court must furnish to either party, at the time, upon request, a statement in writing of the points of law contained in the charge, or sign, at the time, a statement of such points prepared and submitted by the counsel of either party.

"Where either party asks special instructions to be given to the jury, the court must either give such instruction, as requested, or refuse to do so, or give the instruction with a modification, in such manner that it may distinctly appear what instructions were given in whole or in part."—Secs. 608 and 609, pages 265-6-7, Code of Civ. Pro., vol. 3, Deering's Anno. Stat. Cal.

California—Penal.—"In charging the jury the court must state to them all matters of law necessary for their information. All instructions given (except such as might incidentally be given during the admission of evidence) shall be in writing, unless both parties request the giving of an oral instruction, or consent thereto, and when so given orally, all instructions must be taken down by the stenographic reporter. Either party may present to the court any written charge, and request that it be given. If the court thinks it correct and pertinent, it must be given; if not, it must be refused. Upon each charge presented and given or refused, the court must indorse and sign its decision. If part be given and part refused, the court must distinguish, showing by the indorsement what part of the charge was given and what part refused."—Sec. 1127, page 422, Codes of Cali. Annot. (Penal), Pomeroy, 1901.

Colorado.—"When the evidence is concluded, and either party desires special instructions to be given to the jury, such instruction shall be reduced to writing, numbered and signed by the party or his attor-

ney asking the same, and delivered to the court. Before the argument is begun, the court shall give such instructions upon the law to the jury as may be necessary, which instructions shall be in writing and signed by the judge.

"Where either party asks special instructions to be given to the jury, the court shall either give such instructions as requested, or give the instructions with modifications, and shall mark or indorse upon each instruction so offered in such manner that it shall distinctly appear what instructions were given in whole or in part, or refused, or modified, and in like manner the modifications, where made.

"All instructions offered by the parties, or given by the court shall be filed with the papers in the cause, and shall, together with the endorsement thereon indicating the action of the court, be taken as a part of the record of the cause without being made such by a bill of exceptions; and if any such action of the court so indicated, error be assigned, it shall be reviewed in the Appellate court. If requested by either party or the jury, the instructions given may be taken by the jury in their retirement. And in all cases the instructions or any of them may be read to the jury and be commented on by the attorneys in the argument."—Chapter 14, paragraph 187, pages 420, 421, Mills' Anno. Code Col.

Connecticut.—"The court shall decide all issues of law, and all questions of law arising in the trial of any issue of fact; and in committing the cause to the jury shall direct them to find accordingly, and shall submit all questions of fact to the jury, with such observations on the evidence, for their information, as it may think proper, without any direction how they shall find the facts. After the cause is committed to the jury, no pleas, arguments or evidence shall be received before the verdict is returned into court and recorded." (Civil.)—Sec. 753, Chap. 52, Conn. Rev., 1902.

"The court shall state its opinion to the jury upon all questions of law arising in the trial of a criminal cause, and submit to their consideration both the law and the facts, without any direction how to find their verdict." (Crim.)—Sec. 1516, Chap. 97, *Ibid.*

Florida.—"Every charge to a jury shall be oral, except when, in the Circuit, Criminal courts of record or County court, either party, or his attorney, shall request in writing before the evidence is closed that it be in writing, when the judge shall commit it to writing.

"When delivered it shall be filed in the case and become a part of the record. If either of the parties, or their attorneys, present to the judge instructions in writing on any point of law arising on the trial, it shall be the duty of the judge to declare in writing to the jury his ruling thereupon as presented, and pronounce the same to the jury as given or refused.

"Said instructions, as well those given as those denied, shall be signed by the said judge, and be by him filed in the case immediately

after delivery or refusal, and form a part of the record in the case."—Secs. 1497, 8, 9, Chap. 14, Gen. Stat. Fla., 1906.

Georgia.—"The judges of the Superior courts of this state shall, in all cases of felony, and on the trial of all civil cases tried before them, give their charges to the jury in writing; that is to say, shall write out their charges and read the same to the jury, when the counsel for either party shall require them to do so; and it shall be error for such judge to give any other or additional charge than that so written out and read.

"The charge so written out and read, as aforesaid, shall be filed as soon as delivered, with the clerk of the court in which the same was given, and shall be accessible to all persons interested in the same; and the clerk shall give certified copies thereof to any person applying for the same, upon the payment of the usual fee.

"It is error for any or either of the judges of the Superior courts of this state, in any case, whether civil or criminal, or in equity, during its progress, or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved, or as to the guilt of the accused; and should any judge of said court violate the provisions of this section, such violation shall be held by the Supreme court to be error, and the decision in such case reversed, and a new trial granted in the court below, with such directions as the Supreme court may lawfully give."—Secs. 4318, 19 and 4334, Chap. 7, Code 1, Ga., 1895, vol. 2.

Hawaii.—"The jury shall in all cases be the exclusive judges of the facts in suits tried before them, and the judge presiding at any jury trial (hereafter in this chapter, named the court) shall in no case comment upon the character, quality, strength, weakness or credibility of any evidence submitted, or upon the character, attitude, appearance, motive or reliability of any witness sworn in a cause; provided, however, that nothing herein shall be construed to prohibit the court from charging the jury whether there is or is not evidence (indicating the evidence) tending to establish or to rebut any specific fact involved in the cause, nor shall it be construed to prohibit the setting aside of a verdict rendered by such jury, in a proper case, as being against the weight of evidence, and the granting of a new trial therein.

"Unless the parties to the cause or trial either in person or through their attorneys, shall file therein their written consent that the court may charge the jury orally, it shall be the duty of the court, except as provided in the next succeeding section, to reduce to writing and read its charge to the jury; and the manuscript of such charge, signed by the court, shall be filed in the cause, and shall constitute a part thereof.

"Whenever, and as often as the court shall depart from such duty, either party to such suit shall be entitled, as a matter of right, to demand and have granted a new trial of such cause.

"In cases where an official stenographer is present, and taking notes

of the trial proceedings, it shall not be necessary for the court to reduce its charge to writing, but such charge may be given orally, and noted by such stenographer, etc.

"It shall be the duty of the counsel for the respective parties to a cause, to furnish the court with a written memorandum of their request for the charging of the jury upon the points of law involved therein, and it shall not be incumbent upon the court, in cases where the parties are so represented by counsel, to charge the jury upon the law, unless thereto so requested in writing. But in case either party on his behalf, and the court may, of its own motion, charge the jury upon any point of law involved in the trial.

"Where requests for instructions are presented, as provided in section 1801, an argument thereon may be made by the respective counsel, previous to the court passing thereon. Whenever instructions are asked which the court cannot give, he shall, in the margin thereof, write the word 'refused,' and such instruction as the court approves he shall designate by writing in the margin the word 'given.' It shall also be competent for the court to modify an instruction so requested, and to give it in its modified form, but in such manner that it shall distinctly appear what instruction was given and what refused, in whole or in part. All written requests for instructions shall be filed in the cause, and shall form a part of the record therein; and the court shall in no case orally qualify, modify or explain the same to the jury."—Secs. 1798, 1799-1800-1-2, Chap. 119, Rev. L. Hawaii, 1905.

Idaho — Criminal.—"The judge must then charge the jury if requested by either party; he may state the testimony and declare the law, but must not charge the jury in respect to matters of fact; such charge must be reduced to writing before it is given, unless by the mutual consent of the parties it is given orally." (Criminal.)—Sec. 5448, Chap. 231, Idaho Code, Ann., 1901, vol. 4 (Criminal).

"In charging the jury, the court must state to them all matters of law necessary for their information. Either party may present to the court any written charge and request that it be given. If the court thinks it correct and pertinent, it must be given; if not, it must be refused. Upon each charge presented and given or refused, the court must indorse and sign its decision. If part be given and part refused the court must distinguish, showing by the indorsement what part of the charge was given and what part refused."—Sec. 5479, *Ibid.* (Criminal).

Idaho — Civil.—"In charging the jury the court may state to them all matters of law which he thinks necessary for their information in giving their verdict; and if it states the testimony of the case it must inform the jury that they are the exclusive judges of all questions of fact. The court must furnish to either party at the time, upon request, a statement in writing of the points of law contained in the charge or sign at the time a statement of such points prepared and submitted by the counsel of either party.

"Where either party asks special instructions to be given to the jury, the court must either give instructions, as requested, or refuse to do so, or give the instructions with a modification, in such manner that it may distinctly appear what instructions were given in whole or in part."—Secs. 3465-6, Chap. 145, Idaho Code, Ann., vol. 3, 1901 (Civil).

Illinois.—"The court, in charging the jury, shall only instruct as to the law of the case.

"Hereafter no judge shall instruct the petit jury in any case, civil or criminal, unless such instructions are reduced to writing.

"And when instructions are asked which the judge cannot give, he shall, on the margin thereof, write the word 'refused'; and such as he approves he shall write, on the margin thereof, the word 'given'; and he shall in no case, after instructions are given, qualify, modify, or in any manner explain the same to the jury otherwise than in writing.

"Exceptions to the giving or refusing any instructions may be entered at any time before the entry of final judgment in the case. And such instructions, so given, shall be taken by the jury in their retirement, and returned by them, with their verdict, into court."—Secs. 52, 53, 54 and 55, Chapter 110, Starr & Curtis's Ann. Ill. Stat. (2d ed.), 1896.

Illinois—Municipal Court.—"That in trials by jury in the municipal court, the court shall charge the jury as to the law only, and the charge may, in the discretion of the court, be given orally or in writing; but when given orally it shall, at the request of either party, be taken down in shorthand, and a transcript thereof shall be made and shall be signed by the judge and filed in the cause in which such charge is given, and shall be made a part of the record in such cause."—Laws of Ill., 1907, p. 244, Sec. 37.

Indiana.—"The court must then charge the jury; which charge, upon the request of the prosecuting attorney, the defendant or his counsel made at any time before the commencement of the argument, shall be in writing, and the instructions therein contained numbered and signed by the court. In charging the jury the court must state to them all matters of law which are necessary for their information in giving their verdict. If he present the facts of the case, he must inform the jury that they are the exclusive judges of all questions of fact, and that they have a right also to determine the law.

"If the prosecuting attorney, the defendant or his counsel desire special instructions to be given to the jury, such instructions shall be reduced to writing, numbered and signed by the party or his attorney asking them, and delivered to the court before the commencement of the argument. Such charge or charges of the court, or any special instructions, when so written and given by the court, shall in no case be orally qualified, modified or in any manner orally explained to the jury by the court."—Sec. 1901, article 16, page 181, Burns' Annot. Ind. Stat., Sup., 1905.

"That all instructions requested shall be plainly written and numbered consecutively and signed by the party or his counsel. The court shall indicate, before instructing the jury, by a memorandum in writing at the close of the instructions so requested the numbers of those given and of those refused and such memorandum shall be signed by the judge. All instructions given by the court of its own motion shall be in writing and shall be numbered consecutively and signed by the judge. If the court shall modify any instruction requested, the instruction as modified shall be written out at full length and shall be given as one of the instructions given by the court of its own motion, and the instruction as requested shall be refused. All instructions requested, whether given or refused, and all instructions given by the court of its own motion, shall be filed with the clerk of the court at the close of the instruction of the jury; Provided, That if the parties consent thereto, the court may instruct the jury orally, in which case the instructions so given shall be taken in shorthand by the court reporter and by him written out in longhand," etc.—Sec. 544a, article 19, page 50, *Ibid.*

Indian Territory.—See Arkansas.

Iowa.—"When the argument is concluded, either party may request instruction to the jury on points of law, which shall be given or refused by the court. All instructions asked, and the charge of the court, shall be in writing. If the court refuse a written instruction as demanded, but give the same with a modification, which the court may do, such modification shall not be by interlineation or erasure, but shall be well defined, and shall follow such characterizing words as 'changed thus,' which words shall themselves indicate that the same was refused as demanded.

"All instructions requested or given shall be filed by the clerk and be a part of the record, and if the giving or refusal of an instruction is excepted to, it may be noted by the shorthand reporter, and no reason for such exception need be given.

"The instruction given, whether by request or otherwise, shall be in consecutively numbered paragraphs, shall be read to the jury without oral comment or explanation, and be announced as given, and those refused shall be so marked, and the court, without reading them, shall announce such refusal. Those given at the request of either party shall be marked 'given' at the request of the party asking them, naming him as plaintiff or defendant, as the case may be.

"Either party may take and file exceptions to the charge or instructions given, or to the refusal to give any instructions asked, within three days after the verdict, which shall be a part of the record, and may include the same in a motion for a new trial, but in either case the exceptions shall specify the part of the charge or instruction objected to and the ground of the objection."—Secs. 3705-6-7-8 and 9, Code Ia. Anno., 1897.

Kansas.—"When the evidence is concluded and either party desires special instructions to be given to the jury, such instructions shall be reduced to writing, numbered and signed by the party or his attorney asking the same and delivered to the court; the court shall give general instructions to the jury, which shall be in writing and numbered, and signed by the judge, if required by either party. When either party asks for special instructions to be given to the jury, the court shall either give such instructions as requested or positively refuse so to do; or give the instructions with a modification in such manner that it shall distinctly appear what instructions were given in whole or in part, and in like manner those refused, so that either party may except to the instructions as asked for or as modified, or to the modification or to the refusal. All instructions given by the court must be signed by the judge and filed together with those asked for by the parties as a part of the record."—R. S. Kan., 1901, Chap. 80, Sec. 4722.

Kentucky.—"The court shall, on the motion of either party and before any argument to the jury, instruct the jury on the law applicable to the case, which shall always be given in writing."—Sec. 225, page 524, Ky. Codes Rev.; Carroll, 1900 (Criminal).

"When the evidence is concluded, but before the argument to the jury, either party may require the court to direct the jury to find a separate general verdict with the general verdict. If a general verdict be required, either party may ask written instructions to the jury on points of law, which shall be given or refused by the court before the commencement of the argument to the jury."—Sec. 317 (347), page 193, *Ibid.* (Civil).

Louisiana.—"In charging the jury in criminal cases, the judge must limit himself to giving them a knowledge of the law applicable to the case. In doing so, he shall abstain from stating or recapitulating the evidence so as to influence their decision on the facts. He shall not state or repeat to the jury the testimony of any witness; nor shall he give any opinion as to what facts have been proved or disapproved."—Sec. 991, page 261, Rev. L. La. (Criminal), Wolff, 1897.

Massachusetts.—"The courts shall not charge juries with respect to matters of fact, but they may state the testimony and the law."—Sec. 80, Chap. 173, Rev. L. of Mass., 1902, vol. 2.

"The jury shall try, according to established forms and principles of law, all criminal cases which are committed to them, and, after having received the instructions of the court, shall decide, in their discretion, by a general verdict, both the fact and the law involved in the issue, or they may, at their election, find a special verdict."—Sec. 13, Chap. 219, *Ibid.*

Michigan.—"That hereafter in all civil and criminal cases at law, circuit courts, in charging or instructing juries, shall charge or instruct them only as to the law of the case; and such charge or

instruction shall be in writing, and may be given by the court of its own motion.

"On the trial of any case at law, civil or criminal, in circuit courts, after the evidence is concluded and before the case is argued or submitted to the jury, or the court trying the case without a jury, either party may present written requests for instructions on any point of law arising in the cause, and upon such written requests so presented, an argument may be made by the counsel for the respective parties, previous to the court passing thereon as hereinafter enacted.

"Whenever instructions are asked which the court cannot give, he shall, in the margin thereof, write the word 'refused:' and such instructions requested as the court approves, he shall designate by writing in the margin thereof the word 'given.'

"The instructions on law so settled by the court in writing, either upon its own motion or upon the application of the respective parties, shall be read to the jury, filed in and be a part of the record of the case, and the court shall in no case orally qualify, modify, or in any manner explain the same to the jury."—Paragraphs 10243-4-5-6, pages 3104-5-6-7, Com. L. Mich., 1897.

Minnesota.—"Upon the trial of any civil action before a jury in any district or municipal court of this state, any party thereto having an interest in the result of such trial may, before the commencement of the argument to the jury, tender to the court instructions in writing, properly numbered, to be given to the jury, and require the court to indicate before the argument such as will be given; by writing opposite each the words 'given,' 'given as modified by the court,' or 'refused.' And if the court desires, it may hear arguments thereon by the respective counsel before acting on the instructions tendered. And thereupon, during the argument to the jury, any instructions so indicated to be given, may be read to the jury as the law of the case; and the court shall give the same to the jury as the law when such jury is instructed by the court. And the court may of its own motion and shall upon application of either party, also before the commencement of the argument, lay before the parties any instructions properly numbered which it will give to the jury and thereupon the same may be read by any as the law while making an argument to the jury; provided, however, the court may give the jury such other instructions, with those already approved, at the close of the argument, as may be necessary to fully present the law to the jury and secure the ends of justice."—Sec. 5403, page 1451, Chap. 66, Stat. Minn., 1894, Wenzell.

"In charging the jury, the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict; and, if it presents the facts of the case, shall, in addition to what it may deem its duty to say, inform the jury that they are

the exclusive judges of all questions of fact."—Sec. 7333, p. 1916, Chap. 114, Stat. Minn. Wenzell.

Mississippi.—"The judge in any cause, civil or criminal, shall not sum up or comment on the testimony, or charge the jury as to the weight of the evidence; but at the request of either party he shall instruct the jury upon the principles of law applicable to the case. All instructions asked by either party must be in writing, and all alterations or modifications of instructions given by the court or refused shall be in writing, and those given may be taken out by the jury on its retirement. The clerk, before they are read to the jury, shall mark all instructions asked by either party, or given by the court, as being 'given' or 'refused,' as the case may be, and all instructions so marked shall be a part of the record on appeal, without a bill of exceptions."—Sec. 793, Chap. 20, p. 345, Miss. Code, 1906.

Missouri.—"When the evidence is concluded, and before the case is argued or submitted to the jury or to the court sitting as a jury, either party may move the court to give instructions on any point of law arising in the cause, which shall be in writing and shall be given or refused. The court may, of its own motion, give like instructions, and such instructions as shall be given by the court on its own motion or the motion of counsel shall be carried by the jury to their room for their guidance to a correct verdict according to the law and evidence, which instructions shall be returned by the jury into court at the conclusion of the deliberations of such jury, and filed by the clerk and kept as a part of the record in such case."—Sec. 748, p. 277, Chap. 8, Rev. Stat. Mo., 1899.

"The court must instruct the jury in writing upon all questions of law arising in the case which are necessary for their information in giving their verdict, which instructions shall include, whenever necessary, the subjects of good character and reasonable doubt; and a failure to so instruct in cases of felony shall be good cause, when the defendant is found guilty, for setting aside the verdict of the jury and granting a new trial."—Sec. 2627, p. 688, Chap. 16, Rev. Stat. Mo., 1899.

Montana.—"When the evidence is concluded, or at any time before the case is finally submitted to the jury, such instructions shall be reduced to writing, numbered and signed by the party or his attorney asking the same, and delivered to the court. The court shall either give each instruction as requested or positively refuse to do so, or give the instruction with a modification, and shall mark or indorse upon each instruction so offered in such manner so that it shall distinctly appear what instructions were given in whole or in part, and, in like manner, those refused. All instructions given by the court must be filed, together with those refused, as a part of the record.

"When the argument is concluded the court shall charge the jury in writing, giving in connection therewith, such instructions as are offered and allowed. The charge of the court, the instructions given and the modification thereof, and the refusal to give instructions, shall be deemed excepted to and no bill of exceptions shall be required.

"In charging the jury, the court shall give to them all matters of law which it thinks necessary for their information in rendering a verdict."—Sec. 1080, p. 259, 1895 Mont. Codes Ann.; vol. 2, part 3.

Nebraska.—"It shall be the duty of the judges of the several district courts in all cases, both civil and criminal, to reduce their charge or instructions to the jury to writing, before giving the same to the jury, unless the so giving the same is waived by the counsel in the case in open court, and so entered in the record of said case; and either party may request instructions to the jury on points of law, which shall be given or refused by the court. All instructions asked shall be in writing.

"If the court refuse a written instruction as demanded, but give the same with a modification, which the court may do, such modification shall not be by interlineation or erasure, but shall be well defined, and shall follow some such characterizing words as 'changed thus,' which words shall themselves indicate that the same was refused as demanded.

"No oral explanation of any instruction authorized by the preceding sections shall, in any case, be allowed, and any instruction or charge, or any portion of a charge or instruction, given to the jury by the court and not reduced to writing, as aforesaid, or a neglect or refusal on the part of the court to perform any duty enjoined by the preceding sections, shall be error in the trial of the case and sufficient for the reversal of the judgment rendered therein."—R. S. Neb., 1901, p. 512, Secs. 2446-47-50.

Nevada.—"In charging the jury the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict, and if it state the testimony of the case, it shall also inform the jury that they are the exclusive judges of all questions of fact. The court shall furnish to either party, at the time, upon request, a statement in writing of the points of law contained in the charge, or shall sign, at the time, a statement of such points prepared and submitted by the counsel of either party." (Civil.)—Sec. 3262, p. 674, Comp. L. Nev., Ann., 1900.

"The judge shall then charge the jury, if requested by either party; he may state the testimony and declare the law, but shall not charge the jury in respect to matters of fact; such charge shall be reduced to writing before it is given; and in no case shall any charge or instructions be given to the jury otherwise than in writing unless by the mutual consent of the parties."—Sec. 4320, p. 863, *Ibid.* (Criminal.)

New York.—"In charging the jury, the court must state to them, all matters of law which it thinks necessary for their information in giving their verdict; and must, if requested, in addition to what it may deem its duty to say, inform the jury that they are the exclusive judges of all questions of fact."—Code Crim. Proc., Sec. 420, p. 3845, Rev. Stat. N. Y., Birdseye, 3d ed., 1901.

New Mexico.—"Upon the trial of any case, either civil or criminal, in the district courts held within and for various counties of the territory, all instructions to the jury asked by either party, whether given or refused, shall be in writing, and all instructions given by the court at the request of either party or upon its own motion, shall be in writing; and it is hereby made the duty of the court in all cases, whether civil or criminal, to instruct the jury as to the law of the case, and a failure or refusal so to do shall be sufficient ground for a reversal of the judgment by the supreme court upon appeal or writ of error: Provided, however, that the parties to the suit or their attorneys may waive upon the record the instructions in writing.

"Before the argument is concluded either party may request instructions to the jury on points of law, which shall be given or refused by the court. All instructions asked and the charge of the court shall be in writing. The court shall instruct the jury as to the law of the case, but shall not comment upon the weight of the evidence.

"If the court refuse a written instruction, as demanded, but gives the same with a modification, which the court may do, such modification shall not be by interlineation or erasure, but shall be well defined, and shall follow some such characterizing words as, 'Changed thus,' which words shall themselves indicate that the same was refused as demanded.

"The court must read to the jury all the instructions it intends to give and none others, and must announce them as given, and shall announce as refused, without reading to the jury, all those which are refused, and must write the words, 'Given,' or 'Refused,' as the case may be, on the margin of each instruction.

"If the giving or refusal be excepted to, the same may be without any stated reason therefor, and all instructions demanded must be filed, and shall become a part of the record.

"After argument the court may also, of its own motion, charge the jury, such charge shall be in writing in consecutively numbered paragraphs, and no oral explanation thereof shall be allowed; and the provisions of this section shall also apply to the instructions asked by the parties. (Civil.)"—Secs. 2992, 2994-5-6-7-8, p. 773-4, Comp. Laws N. Mex., 1897.

North Carolina.—"Every judge, at the request of any party to an action on trial, made at or before the close of the evidence, before instructing the jury on the law, shall put his instructions in writing, and read them to the jury; he shall then sign and file them with the clerk as a part of the record of the action.

"Whenever a judge shall put his instructions to the jury in writing, either of his own will, or at the request of any party to an action on trial, he shall, at the request of either party to the action, allow the jury to take his instructions with them on their retirement, and the jury shall return said instructions with their verdict to the court.

"Counsel praying of the judge instructions to the jury, shall put their request in writing entitled of the cause, and sign them; otherwise the judge may disregard them. They shall be filed with the clerk as a part of the record."—Sec. 535-6-7, p. 533, vol. 1, Rev. 1905, N. Caro.

North Dakota.—"The court in charging the jury shall instruct the jury as to the law of the case; and no court shall instruct the jury in any civil case, unless such instructions are first reduced to writing. Either party may request instructions to the jury. Each instruction so requested must be written on a separate sheet and may be given or refused by the court, and the court shall write on the margin of such requested instruction given by him the word 'given,' and on the margin of those which he does not give he shall write the word 'refused,' and all instructions asked for by the counsel shall be given or refused by the court without modification or change, unless modified or changed by consent of the counsel asking the same. The court may in its discretion submit the written instructions, which it proposes to give to the jury, to counsel in the case for examination, and require such counsel after a reasonable examination thereof to designate such parts thereof as he may deem objectionable, and such counsel must thereupon designate such parts of such instructions as he may deem improper, and thereafter only such part so designated shall be excepted to by counsel so designating the same."—Sec. 5432, p. 117, Rev. Code N. Dak., 1899.

"All instructions given to the jury must be read to them by the court without disclosing to them whether such instructions were requested or not, and must be signed by the judge and delivered to the jury and shall be taken by the jury in their retirement and returned with their verdict into court and upon the close of the trial all instructions given or refused must be filed with the clerk, and either party may, within 20 days from the date of such filing, file with the clerk exceptions to any of such instructions or refusal to instruct and the same shall thereupon be deemed duly excepted to; *provided*, that with the consent of both parties entered in the minutes the court may instruct the jury orally, in which case such oral instructions shall be taken down by the official stenographer and written out at length and the shorthand notes thereof, together with such instructions so written out, shall be filed in the case with the clerk, and either party may except to any of such instructions within twenty days after the date of such filing, as hereinbefore provided; *provided*, that the official stenographer shall receive for writing out such instructions the same fees as for making transcripts; and provided, further, that when oral

instructions are given, the jury shall not take the charge in their retirement unless so ordered by the court."—Sec. 5433, *Ibid.*

"In charging the jury, the court must state to them all matters of law which it thinks necessary for their information in giving their verdict, and if it states the testimony of the case, it must in addition inform the jury that they are the exclusive judges of all questions of fact. Either party may present to the court any written charge, and request that it be given. If the court thinks it correct and pertinent, it must be given; if not, it must be refused. Upon each charge presented and refused court must indorse or sign its decision."—Sec. 8217 Crim. Proc., p. 1606, *Ibid.*

Ohio.—"When the evidence is concluded, either party may present written instructions to the court on matters of law, and request the same to be given to the jury, which instructions shall be given or refused by the court before the argument to the jury is commenced.

"The court, after the argument is concluded, shall, before proceeding with other business, charge the jury; any charge shall be reduced to writing by the court, if either party, before the argument to the jury is commenced, request it; a charge or instruction, when so written and given, shall not be orally qualified, modified, or in any matter explained to the jury by the court; and all written charges and instructions shall be taken by the jurors in their retirement, and returned with their verdict into court, and shall remain on file with the papers of the case."—Sec. 8699, p. 1780, Lanings Rev. Stat. and Recod. Laws of Ohio, 1905. (Civil.) Sec. 11054, p. 2173 in regard to Crim. Proc. same provisions as civil; slightly differently worded.

Oregon.—"In charging the jury, the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict, but it shall not present the facts of the case, but shall inform the jury that they are the exclusive judges of all questions of fact."—Sec. 139, Chap. 3, Bellinger & Cotton's Ann. Codes and Stat. of Ore.

Pennsylvania.—"The president judges of the several courts of common pleas of this commonwealth, in every case tried before them respectively, upon request of any party or attorney concerned therein, reduce the whole opinion, and charge of the court to writing, at the time of the delivery of the same, and shall forthwith file the same of record."—Sec. 166, p. 3640, vol. 2, Pepper and Lewis' Dig. L. Pa., 1896.

South Dakota.—"The court, in charging the jury, shall only instruct as to the law of the case, and no court shall instruct the petit jury in any case, civil or criminal, unless such instructions are reduced to writing; and when instructions are asked which the judge cannot give, he shall write on the margin thereof the word 'Refused,' and such as he approves he shall write on the margin thereof the word 'Given,' and he shall in no case, after instructions are given, qualify,

modify or in any manner explain the same to the jury, otherwise than in writing; and all instructions asked for by counsel shall be given or refused by the judge, without modification or change, unless such modification or change be consented to by the counsel asking the same."—Sec. 6255, p. 1565, vol. 2, Grantham's Ann. S. D. Stat., 1901. (Civil.)

"The judge must then charge the jury; he may state the testimony, and must declare the law, but must not charge the jury in respect to matters of fact; such charge must, if so requested, be reduced to writing before it is given, unless by tacit or mutual consent it is given orally, or unless it is fully taken down at the time it is given by a stenographic reporter, appointed by the court."—Sec. 8639, p. 2074, *Ibid.* (Criminal.)

Rhode Island.—"In every case, civil and criminal, tried in said common pleas division with a jury, the justice presiding shall instruct the jury in the law relating to the same, and may sum up the evidence therein to the jury whenever said justice may deem it advisable so to do; but any material misstatement of the testimony by said justice shall, upon petition of the party aggrieved, be cause for a new trial."—Sec. 13, Chap. 223, Gen. L. of R. I., 1896.

Tennessee.—"On the trial of civil cases in the courts of this state, it shall be the duty of the judge before whom the same is tried, at the request of either party, plaintiff or defendant, to reduce every word of his charge to writing before it is delivered to the jury, and all subsequent instructions which may be asked for by the jury, or which may be given by the judge, shall, in like manner, be reduced to writing before being delivered to the jury."—Sec. 4683, p. 1177, Code Tenn. Ann., 1896, Shannon.

"On the trial of all felonies, every word of the judge's charge shall be reduced to writing before given to the jury, and no part of it whatever shall be delivered orally in any such case, but shall be delivered wholly in writing. Every word of the charge shall be written, and read from the writing, which shall be filed with the papers, and the jury shall take it out with them upon their retirement.

"If the attorneys on either side desire further instructions given to the jury, they shall write precisely what they desire the judge to say further. In such case the judge shall reduce his decision on the proposition or propositions to writing, and also read the same to the jury without one word of oral comment, it being intended to prohibit judges wholly from making oral statements to juries in any case involving the liberties and lives of the citizens.

"It shall be the duty of all judges in the state charging juries in case of criminal prosecutions for any felony wherein two or more grades or classes of offense may be included in the indictment, without any request on the part of the defendant to do so."—Sec. 7186-7-8, ps. 1716-17, *Ibid.*

Texas—Civil.—"After the argument of a cause the judge may, in open court, deliver a charge to the jury on the law of the case, subject to the restrictions hereinafter provided.

"The charge shall be in writing and signed by the judge, and he shall read it to the jury in the precise words in which it is written; he shall not charge or comment on the weight of evidence; he shall so frame the charge as to distinctly separate the questions of law from the questions of fact; he shall decide on and instruct the jury as to the law arising on the facts, and shall submit all controverted questions of fact solely to the decision of the jury.

"Such charge shall be filed by the clerk and shall constitute a part of the record of the cause, and shall be regarded as excepted to, and subject to revision for errors therein, without the necessity of taking any bill of exception thereto. Either party may present to the judge, in writing, such instructions as he desires to be given to the jury, and the judge may give such instructions, or a part thereof, or he may refuse to give them, as he may see proper, and he shall read to the jury such of them as he may give.

"When the instructions asked, or some of them, are refused, the judge shall note distinctly which of them he gives and which he refuses, and shall subscribe his name thereto, and such instructions shall be filed with the clerk, and shall constitute a part of the record of the cause, subject to revision for error without the necessity of taking any bill of exception thereto. The charge and instructions given to the jury may be carried with them by the jury in their retirement, and an additional charge or instructions may be given them upon any question of law arising in the case, in conformity with the preceding rules, upon the application of the jury therefor in open court."—Arts. 1316-17-18-19-20-21, Chap. 12, Sayles' Tex. Civil Stat., vol. 1, 1897.

Texas — Criminal.— "After the argument of a criminal cause has been concluded, the judge shall deliver to the jury a written charge, in which he shall distinctly set forth the law applicable to the case; but he shall not express any opinion as to the weight of evidence, nor shall he sum up the testimony. This charge shall be given in all cases of felony, whether asked or not. It is beyond the province of a judge sitting in criminal causes to discuss the facts or use any argument in his charge calculated to rouse the sympathy or excite the passion of a jury. It is his duty to state plainly the law of the case.

"After or before the charge of the court to the jury the counsel on both sides may present written instructions and ask that they be given to the jury. The court shall either give or refuse these charges, with or without modification, and certify thereto; and when the court shall modify a charge it shall be done in writing and in such manner as to clearly show what the modification is.

"The general charge given by the court, as well as those given or

refused at the request of either party, shall be certified by the judge and filed among the papers in the cause, and shall constitute a part of the record of the cause.

"In criminal actions for misdemeanor the court is not required to charge the jury, except at the request of the counsel on either side; but when so requested, shall give or refuse such charges, with or without modification, as are asked in writing.

"No verbal charge shall be given in any case whatever, except in cases of misdemeanor, and then only by consent of the parties.

"When charges are asked the judge shall read to the jury only such as he gives. The jury may take with them, in their retirement, the charges given by the court after the same have been filed, but they shall not be permitted to take with them any charge, or portion of a charge, that has been asked of the court and which the court has refused to give."—Arts. 715-16-17-18-19-20-21-22, Chap. 5, White's Ann. Code Crim. Proc., 1900.

Utah.—"When the evidence is concluded, the court shall instruct the jury in writing upon the law applicable to the case, and, if it state the testimony of the case, it must inform the jury that they are the exclusive judges of all questions of fact; provided, that with the consent of both parties entered in the minutes the court may instruct the jury orally, in which case the instructions shall be taken down by the court stenographer.

"Either party may, before the court has instructed the jury, or later by consent of the court, ask special instructions, which shall be in writing and numbered, and the court must either give such instructions as requested or refuse to do so, or give the instructions with modifications. Those refused shall be so marked; those modified shall be marked in such manner as clearly to point out the charges therein by words indicating the same.

"The instructions given shall be in consecutively numbered paragraphs, and shall be read to the jury without oral comment or explanation.

"When the charge is in writing, it must be signed by the judge and delivered to the jury, and may be taken by the jury in their retirement and returned with their verdict into court."—Sec. 3147-48-49-50, ps. 695-6, Rev. Stat. Utah, 1898.

Washington.—"When the evidence is concluded, either party may request the judge to charge the jury in writing, in which event no other charge or instruction shall be given, except the same be contained in the said written charge; or either party may request instructions to the jury on points of law, and if the court refuse to give the same, the party requesting may except.

"The court shall then charge the jury upon the law in the case. If no request has been made for said charge the same will be oral; but either party, at any time before the jury return their verdict, may except to the same or any part thereof; but no exception shall be re-

garded by the supreme court, unless the same shall embody the specific parts of said charge to which exception is taken. In charging the jury, the court shall state to them all matters of law necessary for the information of the jury in finding a verdict; and if it become necessary to allude to the evidence, it shall also inform the jury that they are the exclusive judges of all questions of fact.—Sec. 4993, ps. 1366-7, Ballinger's Ann. Codes and Stat. Wash., 1897.

Wisconsin.—"Upon the trial of every action, the judge presiding shall, before giving the same to the jury, reduce to writing and give as written his charge and instructions to the jury; and all further and particular instructions given them when they shall return after having once retired to deliberate, unless a written charge be waived by counsel at the commencement of the trial; and except that the charge or instructions may be delivered orally when taken down by the official stenographic reporter of the court. Each instruction asked by counsel to be given to the jury shall be given without change or modification, the same as asked, or refused in full. If any judge shall violate any of the foregoing provisions, or make any comments to the jury upon the law or facts on the trial in any action without the same being so reduced to writing or taken down, the judgment rendered upon the verdict found shall be reversed upon appeal or writ of error, upon the fact appearing."—Sec. 2853, p. 1998, Wis. Stat., 1898, Ann.

Wyoming.—"When the evidence is concluded, and either party desires special instruction to be given to the jury, such instructions shall be reduced to writing, numbered and signed by the party or his attorney asking the same, and delivered to the court. And before the argument of the case is begun, the court shall give such instructions upon the law to the jury as may be necessary, which instructions shall be in writing, and be numbered and signed by the judge.

"When either party asks special instruction to be given to the jury, the court shall either give such instruction as requested, or positively refuse to do so; or give the instruction with modifications, and shall mark or endorse upon each instruction so offered in such manner that it shall distinctly appear what instructions were given in whole or in part, and in like manner those refused or modified as to the modification. All instructions given by the court must be filed, together with those refused, as a part of the record."—Sec. 3644, p. 957, Rev. Stat. Wyo., 1899.

§ 154. Court May Instruct Without Being Asked. A judge of the trial court is at liberty to instruct, at his discretion, if he reduces his instructions to writing, so the jury can take them with them in considering their verdict.[2] The duty of the

2—Brown v. The People, 4 Gilm. 439; Green v. Lewis, 13 Ill. 642; Chicago v. Keefe, 114 Ill. 222; Chgo. G. T. Ry. v. Smith, 124 Ill. App. 628.

court consists in giving such clear, concise and comprehensive instructions to the jury upon the law governing the case and the issues involved that neither side will have reason to complain on account of any prejudice. While this is undoubtedly the court's work, it is not an obligation of which the failure to perform would be considered prejudicial and sufficient to reverse the case, unless such instructions were erroneous or appeared to lean in favor of one party more than the other.

§ 155. Duty to Instruct Whether Requested or Not. It is the duty of the judge to see that every case so goes to the jury that they have clear and intelligent notions of the points they are to decide, and to this end he should give necessary instructions whether so requested by counsel or not, and his failure so to do is held ground for a new trial where the verdict was not one which effectuated justice between the parties,[3] and the court should instruct the jury as to the issues joined in the pleadings, and to determine from the pleadings what allegations are admitted and what denied. It is held on the contrary, however, that it is not a duty resting on the judge to instruct a jury on its own motion unless so requested.[4]

§ 156. Failure to Instruct Cannot Be Objected to Unless Written Instructions Have Been Presented. Each party has the right to have the jury instructed upon the law of the case clearly and pointedly, so as to leave no reasonable ground for misapprehension or mistake; and if the instructions of the court fail thus to instruct, it is error to refuse one calculated to cure the omission.[5] If the court fails to give such full instructions as the parties consider themselves entitled to, it is their own fault in not having presented to the court such instructions. If, however, such instructions had been presented, but not given by the court, there would be a sufficient ground for complaint.

It is held that the instructions desired by the parties must be submitted to the court before the arguments to the jury, otherwise they would come too late.

As a rule the instructions of the court should be comprehen-

3—Owen v. Owen, 22 Iowa 270; The State v. Brainard, 25 Iowa 572.

4—Pharo et al. v. Johnson, 15 Iowa 560; Potter v. C., R. I. & P. R. Co. 46 Iowa 399; Dassler v. Wisley, 32 Mo. 498; Ch. & G. T. R. v. Smith, *supra*.

5—Muldowney v. Ill. Cent. Rd. Co., 32 Iowa 176; Carpenter v. State, 43 Ind. 371; Morris v. Platt, 32 Conn. 75; Nels v. State, 2 Tex. 280.

sive and cover the case in dispute, although it is held that instructions cannot be objected to as inadequate unless written requests have been made for further instructions.[6]

§ 157. Instructions Given on Request of Parties. It is held to be the duty of the trial judge, when requested, to instruct the jury upon every point of law pertinent to the issues,[7] but the better rule seems to be that it is the duty of the judge to present to the jury the substantial issues in the cause and the principles of law governing the same, whether the parties request the same or not.[8] In the absence of any statute it is usually held to be discretionary with the court whether he will instruct the jury or not, unless requested to do so by either party.[9] On the other hand, in some states the statutes forbid the giving of any instructions by the court excepting where requested.[10]

§ 158. Statutes Mandatory—Instructions Must Be in Writing. A judge on the trial of a cause has no authority to affect or change the law as stated in written instructions, by any statement not in writing. It is error for the court to instruct the jury orally, or to orally explain or modify an instruction.[11] It is violation of the statute for the court to instruct the jury orally as to the impropriety of certain modes of arriving at their verdict.[12]

All instructions in the state of Illinois either in civil or

6—Van De Bogart v. M. N. Paper Co., 127 Wis. 104, 106 N. W. 805; Benson v. State, 119 Ind. 488, 31 N. E. 1109. Where the instruction came too late the court committed no error in refusing to give it, citing Rev. St. 1881, cl. 6, para. 1823; Foxwell v. State, 63 Ind. 539; Suber v. State, 99 Ind. 71; Grubb v. State, 117 Ind. 277, 20 N. E. 257.

7—People v. Taylor, 36 Cal. 255; Hays v. Paul, 51 Penn. St. 134; Lyttle v. Boyer, 33 Ohio St. 506; Ray v. Goings, 112 Ill. 656.

8—Upton v. Paxton, 72 Iowa 299, 33 N. W. 777; Barton v. Gray, 57 Mich. 622.

9—Reizenstein v. Clark, 104 Iowa 287, 73 N. W. 588; C. & A. R. Co. v. Esten, 78 Ill. App. 326, affd. 178 Ill. 192, 52 N. E. 954.

10—Archer v. Sinclair, 49 Miss. 343.

11—Ray v. Woolters, 19 Ill. 82; Head et al. v. Langworthy, 15 Iowa 235; Hardin v. Helton, 50 Ind. 320; Horton v. Williams, 21 Minn. 187; State v. Jones, 61 Mo. 232; Miller v. Hampton, 37 Ala. 342; Widner v. State, 28 Ind. 394; Strattan v. Paul, 10 Iowa 139; O'Donnell v. Segar, 25 Mich. 367.

12—I. C. R. Co. v. Hammer, 85 Ill. 526. Written instructions, when requested in writing, must be given by the court in Indiana. Stephenson v. State, 110 Ind. 358, 11 N. E. 360, (368) 59 Am. Rep. 261.

criminal cases must be presented to the court in writing.[13] The charges of the court to juries are no longer required to be sealed by the judge. The law now usually only requires them to be in writing, signed by the judge, and filed as part of the record in the case.[14]

§ 159. In Writing May Be Waived. While the statute requires the instructions given to the jury shall be in writing, the parties may waive that provision of the law, and when they do so and consent that the court may instruct the jury orally, they are estopped from afterwards objecting.[15] When oral instructions are not excepted to on that ground, at the time, the error will be regarded as waived.[16]

§ 160. Court May Limit the Time for Instructions. Circuit courts have the power, by reasonable and proper rules, to prescribe within what time, during the progress of the trial, the instructions must be presented to the court.[17] The courts have the power to make regulations concerning the time in which the instructions requested should be handed to the court, and it is generally provided that this must be done before the argument to the jury.[18]

It is discretionary with the judge to receive or reject instructions which have not been handed in in proper time, al-

13—Practice Act, Secs. 72-75, p. 458, Illinois Session Laws 1907; I. C. R. Co. v. Wheeler, 149 Ill. 525, 36 N. E. 1023.

14—Denmark v. State, 43 Fla. 182, 31 So. 269, (270). Sections 1091, 2920, Fla. Rev. St. Chap. 4388 Acts 1895.

15—Bates v. Ball, 72 Ill. 108; Litzelmal v. Howell, 20 Ill. App. 588.

16—State v. Sipult, 17 Iowa 575; Vanwey v. State, 41 Tex. 639.

17—Prindiville v. The People, 42 Ill. 217.

The Statutes of Indiana provide that "if the prosecuting attorney, the defendant, or his counsel shall desire special instructions to be given by the court, such instructions shall be reduced to writing, numbered and signed by the party, or his attorney, asking them, and delivered to the court before the commencement of the argument. Construing these provisions of our Criminal Code together, we are of the opinion that the court would not be required to instruct the jury as provided in section 1798, unless asked to do so. As we have seen, in this case the court was not asked to give this instruction until after the argument in the case had closed, and the jury had been instructed. This was too late. It should have been reduced to writing and *delivered to the court before the argument commenced.*"—Foxwell v. State, 63 Ind. 539; Grubb v. State, 117 Ind. 277, 20 N. E. 257; quoting Foxwell v. State, 63 Ind. 539; Lueber v. State, 99 Ind. 71.

18—Craig v. Frazier, 127 Ind. 286, 26 N. E. 842.

though the Supreme Court of Illinois has held it improper to refuse an instruction not presented in time, unless there was some rule of court on record, or in writing, specifying the time, in which instructions could be presented.[19]

§ 161. Reading Instructions Given to the Jury—Marking Instructions "Given" or "Refused" or "Changed Thus." The statutes of many states provide for reading of the instructions, by the court, and also frequently provide for marking the instructions on the margin to show whether any instruction has been given or refused. The statute of Nebraska reads as follows: "The court must read over all the instructions which it intends to give, and none others, to the jury, and must announce them as given, and shall announce as refused, without reading to the jury, all those which are refused, and must write the words 'given' or 'refused,' as the case may be, on the margin of each instruction." In construing this section the Supreme Court said: "From the language of this section, it is clear that it was the intention of the legislature to make it the *duty of the trial court to read to the jury all instructions* given to them on the trial of a cause, or, in other words, to make the *method of giving instructions that of reading them to the jury.* The statute not only imposes upon the court the duty of reading the instructions to the jury, but insures to every suitor the right to have all instructions which he shall present, and which shall be deemed proper to be given to the jury, read to them at length by the court. A refusal or neglect to discharge this duty, and a denial of this right to a suitor in any cause, are administrations without that due process of law required by the constitution of this state, and must be held to be reversible error."[20]

The instructions as presented should be marked either "given" or "refused," or marked when modified by the court, by the words "changed thus," which words indicate that the instruction in the form it was given was refused.[21]

§ 162. Numbering and Signing Instructions. Usually the instructions requested must be presented in writing and sometimes are required to be numbered and signed by the party re-

19—Chicago P. B. Co. v. Sobkowiak, 148 Ill. 573, 36 N. E. 572.

20—McDuffee v. Bentley, 27 Neb. 380, 43 N. W. 123 (126).

"Instructions to juries" Section 54, Chapter 19, Statutes of Nebraska.

21—Ham v. W. I. & N. R. Co., 61 Iowa 716, 17 N. W. 157.

questing them.[22] The numbering and signing of the instructions is for the benefit and convenience of the court, as well as for the safeguarding of the interests of the parties to the suit, by providing a method for their objections and exceptions to be properly made and preserved.

§ 163. Must Not Assume Facts Not Admitted. It is the province of the court to instruct the jury as to the law of the case, and that of the jury to find the facts proved by the evidence. It is error for the court, in giving an instruction, to assume that facts have been proved, or that a certain state of facts exist.[23]

Instances: "In this case the plaintiff is entitled to recover all damages proved to have been sustained by him on account of the trespass committed by the defendant on plaintiff's premises, as claimed in the declaration."[24]

"If the jury believe from the evidence that Bond and Shinn were together and acting in concert at the time of the assault, they should find them equally guilty."[25]

An instruction commencing, "We will now direct your attention to the question whether the defendant gave the deceased strychnine with a criminal intent"—held to be erroneous, as liable to be understood by the jury to assume the disputed point, whether he gave her poison at all, leaving to them only the question of intent.[26]

§ 164. Assuming Facts to Be True. Conceded facts[27] and facts not controverted, may be assumed in the instructions as true,[28] but material facts in controversy upon which there is any conflict of evidence should not be assumed.[29] Facts of which there is no evidence at all would be error to assume as true in the instructions,[30] unless such facts are matters of common knowledge.[31]

22—Swift & Co. v. Fue, 167 Ill. 443, 47 N. E. 761.

23—Russell v. Minteer, 83 Ill. 150; Stier v. The City, etc., 41 Iowa 353; Siebert v. Leonard, 21 Minn. 442; Jardieke v. Scropford, 15 Kan. 120; C. & A. R. R. Co. v. Robinson, 106 Ill. 142.

24—Small v. Brainerd, 44 Ill. 355; Boddie v. State, 52 Ala. 395; N. J. L. Ins. Co. v. Baker, 94 U. S. 610; Peck v. Ritchey, 66 Mo. 114.

25—Bond et al. v. The People, 39 Ill. 26.

26—Snyder v. The State, 59 Ind. 105.

27—Haines v. Amerine, 48 Ill. App. 570.

28—Garretson v. Becker, 52 Ill. App. 255; Reed v. Manierre, 124 Ill. App. 127.

29—D. T. & W. Co. v. Dandelin, 143 Ill. 409, 32 N. E. 258.

30—Langdon v. People, 133 Ill. 382, 24 N. E. 874.

31—Joliet v. Shufeldt, 144 Ill. 403, 18 L. R. A. 750, 32 N. E. 969.

§ 165. Facts Not Controverted May Be Assumed. Where an instruction assumes the existence of a fact in issue by the pleadings, but which is admitted by the party objecting in his testimony, and there is no evidence contradicting such admission, there will be no material error in giving such instruction.[32]

If an instruction assumes the existence of facts not controverted on the trial, and which under the circumstances, if assumed, could not prejudice, there will be no error.[33] It is often a matter of convenience, and avoids circumlocution, to assume the existence of certain facts about which the parties are agreed, and neither party under such circumstances can afterwards make such assumption a ground of objection to the instruction.[34]

When all the evidence on both sides tends clearly to prove a fact, and if true does prove it, and there is nothing to cast doubt upon it, such fact may and generally should be assumed as proved and the jury told that there is no evidence from which they can find against the fact as proved.[35]

§ 166. Instructions Should Indicate No Opinion as to the Weight of Evidence. In giving instructions, the judge should always abstain from in any manner indicating an opinion as to the weight of evidence, unless it is of that character which the law deems conclusive.[36]

§ 167. Instructions May Assume What the Law Presumes. When the circumstances proved are of such a character that the law itself raises a presumption, the court may properly instruct the jury to draw such inference.[37]

§ 168. Right of the Parties to Assume Any Reasonable Hypothesis on the Facts. In preparing instructions each party may assume any reasonable hypothesis in relation to the facts of the case, and ask the court to declare the law as applicable to it, and it is error to refuse an instruction so framed because

32—Heartt v. Rhodes, 66 Ill. 351; Weeks v. Cottingham, 58 Ga. 559.

33—Miller v. Kirby, 74 Ill. 242; Hughes v. Monty, 24 Iowa 499; Davis v. The People, 114 Ill. 86, 29 N. E. 192.

34—Martin v. The People, 13 Ill. 341.

35—Druse v. Wheeler, 26 Mich. 189; Caldwell v. Stephens, 57 Ill. 589; Hanrahan v. The People, 91 Ill. 142; Hauk v. Brownell, 120 Ill. 161, 11 N. E. 416.

36—Frame v. Badger, 79 Ill. 441.

37—Herkelrath v. Stookey, 63 Ill. 486; Griffin v. C. R. I. & P. Ry. Co., 68 Iowa 638, 27 N. W. 792.

the case supposed does not include some other hypothesis equally rational.[38]

§ 169. Reference to Pleadings in Instructions. The pleadings should not be referred to in the instructions for statements of the issues involved, but the court should state to the jury what facts must be proved to sustain their finding of a verdict.[39] If the instructions refer to the pleadings, the court should state the allegations that are material and not leave them to the jury. The jury should not be told that it is sufficient that the facts be proved substantially as charged, as the jury cannot be presumed to know what is material or substantial in the case. The court should not instruct that it is necessary for the party seeking to recover to prove his case by a preponderance of the evidence as laid in the declaration or plea, as the case may be, or in some count thereof.

It must be understood, however, that the above criticisms do not concern the referring of the pleadings to the jury and allowing them to determine legal questions therein involved which is improper; it is held proper, however, to refer the pleadings to the jury so that they may consider the narrations of fact therein, to determine whether the same have been proved, but not authorizing them to determine the legal effect of the pleadings.[40]

§ 170. Referring to Issues Involved in Case. The court must so instruct the jury that they may intelligently understand questions upon which they are to pass, and ordinarily an omission to do this would constitute error.[41] To this end a statement of the issues involved in the case tends materially to assist the jury in arriving at their verdict,[42] but in no case should the jury be directed to the pleadings for the ascertainment of the issues in the case.[43]

38—People v. Taylor, 36 Cal. 255; Hays v. Paul, 51 Pa. St. 134; Lytle v. Boyer, 33 Ohio St. 506; Roy v. Goings, 112 Ill. 656.

39—Lumaghi v. Gardien, 53 Ill. App. 667; Baker et al. v. Summers, 201 Ill. 57, Rev. 103, Ill. App. 37, 66 N. E. 302.

40—Bering Mfg. Co. v. Femelat, 35 Tex. Civ. App. 36, 79 S. W. 869; U. S. Brewing Co. v. Stoltenberg, 211 Ill. 531, 71 N. E. 108; W. C. St. Ry. v. Liesserowitz, 197 Ill. 607, 64 N. E. 718; Malott v. Hood, 201 Ill. 207, aff'g 99 Ill. App. 360, 66 N. E. 247; I. C. Ry. C. v. Jernigan, 198 Ill. 297, aff'g 101 App. 1, 65 N. E. 88.

41—Hill v. Aultman, 68 Iowa 630, 27 N. W. 788.

42—Fannon v. Robinson, 10 Iowa 272.

43—Morrison v. B. C. R. & N. Ry. Co., 84 Iowa 663, 51 N. W. 75.

§ 171. Should Be Confined to the Issues Being Tried. The instructions of the court should be restricted to the issues made by the pleadings, and to the evidence.[44] When the declaration alleges the personal negligence of the defendant as the ground of liability, it is a fatal objection to the instructions that they direct the attention of the jury to other and different elements of liability.[45]

When the plaintiff declares upon a completed sale, it is erroneous for the court, in instructing for him, to submit to the jury the question of an executory contract of sale.[46] In an action on a warranty it would be error for the court to instruct the jury as to what acts constitute fraud.[47]

Where in an action upon an alleged express contract, evidence was introduced without objection, putting the fact of such contract in issue, it was held not to be error to instruct the jury with reference to an express contract, even though the pleadings put in issue an implied contract only.[48]

§ 172. Instructions Must Be Accurate and Pertinent. Where the evidence is conflicting and the case is a strongly contested one, the instructions upon the law given to the jury must be accurate,[49] and wherever the facts are close it is held that the court must give instructions which are of greater accuracy than would, perhaps, otherwise be demanded.[49a] And it is necessary that instructions should not only be correct in law, but pertinent to the issues involved.[50]

§ 173. Instructions Regarded as a Whole—When Faulty Instructions May Be Cured by Others. The instructions should be regarded as a whole and considered together and not disconnectedly, even though there be a considerable number in a series.[51] One instruction, although faulty by reason of the omission of certain essential matters, may be cured by other

44—Nollen v. Wisner et al., 11 Iowa 190; Iron Mount. Bank v. Murdock, 62 Mo. 70; Hall v. Strode, 19 Neb. 658, 28 N. W. 312.

45—Ch. & Alt. R. R. Co. v. Mock, 72 Ill. 141; Colum., C. & I. R. R. Co. v. Troesch, 68 Ill. 545.

46—Seckel v. Scott, 66 Ill. 106.

47—Wallace v. Wren, 32 Ill. 146.

48—Rogers v. Millard, 44 Iowa 466.

49—I. C. R. R. Co. v. Berry, 81 Ill. App. 17.

49a—Reg.-Gaz. Co. v. Larash, 123 Ill. App. 453; R. Co. v. Appel, 103 Ill. App. 187.

50—Flannigan v. B. & O. Ry., 83 Iowa 639, 50 N. W. 60; Negley v. Cowel, 91 Iowa 256, 59 N. W. 48; Van Winkle v. C. M. & St. P. Ry. Co., 93 Iowa 509, 61 N. W. 929.

51—C. C. C. & St. L. Ry. v. Monaghan, 140 Ill. 474, 30 N. E. 869.

instructions given.[52] However, if the instruction covers the whole case and is affirmative and positive, it is not cured by a succeeding instruction which lays down the rule correctly, both instructions apparently being equally affirmative and neither seeming to be connected with or qualified by the other, as the jury may have followed one or the other of these instructions, which one it is impossible to determine.[53]

The court should not use incorrect instructions and expect succeeding correct ones to cure the defect. The instructions given to the jury are and constitute one connected body and series, and should be so regarded and treated by the jury; that is to say, they should apply them to the facts as a whole, and not detached or separated, any one instruction from any or either of the others.[54] "It is the duty of the jury to consider all the instructions together, and when this court can see that an instruction in the series, although not stating the law correctly, is qualified by others, so that the jury were not likely to have been misled, the error will be obviated."[55] "A charge to the jury must be taken together, and it is not necessary to insert in each separate instruction all the exceptions, limitations and conditions which are inserted in the charge as a whole."[56]

All the instructions should be considered together, and a judgment will not be reversed because some one of them fails to state the law applicable to the facts with sufficient qualification, provided the defects be cured in other instructions.[57] Instructions are to be considered as a single series, and when so considered, if as a whole they state the law correctly, that is sufficient, even though one or more of them, standing alone, might be erroneous.[58]

§ 174. Should Be Harmonious. The giving of a correct instruction upon a point in the case, will not obviate an error in an instruction on the other side, when they are entirely variant

52—Tedens v. Chicago Sanitary District, 149 Ill. 87; C. & A. R. v. Walters, 217 Ill. 87, 75 N. E. 441.

53—Miller v. McKinney, 45 Ill. App. 447.

54—N. C. St. R. R. Co. v. Kaspers, 186 Ill. 246 (250), aff. 85 Ill. App. 316, 57 N. E. 849.

55—Anderson v. Walter, 34 Mich. 113; State v. Donavan, 10 Neb. 36.

56—People v. Cleveland, 49 Cal. 578.

57—Rice v. The City, etc., 40 Iowa 638; The State v. Maloy, 44 Iowa 104.

58—Mitchell v. Hindman, 150 Ill. 538, 37 N. E. 916; Laurance v. Goodwil, 170 Ill. 390, 48 N. E. 903; Cent. Ry. Co. v. Bannister, 195 Ill. 48 (50-1), aff. 96 Ill. App. 332, 62 N. E. 864.

and there is nothing to show the jury which to adopt.[59] One correct instruction will not always cure an erroneous one. The court should harmonize the instructions, else they are calculated to confuse and mislead the jury.[60]

Where one instruction states the defendant's liability more strongly than the law warrants, and another of the series states it correctly, and the two instructions relate to vital points in issue, they are calculated to confuse the jury, and the latter instruction will not cure the error.[61]

§ 175. One Instruction May Be Limited by Others. Although an instruction, considered by itself, is too general, yet, if it is properly limited by others, so that it is not probable it could have misled the jury, judgment will not be reversed on account of such instruction. The defective instruction may be limited by instructions given on either side or may be supplemented by other instructions so as to cure any such error.[62]

§ 176. Undue Prominence to any Fact—Referring to Prior Trials. Undue prominence should not be given to any fact in the instructions,[63] nor should the court state in a prominent manner a fact in the conduct of one party and omit the explanation of the other party in reference thereto.[64] Nor should the court magnify the importance of the case by stating that it has been twice tried already and that it is important that they reach an agreement.[65] An instruction which singles out and gives undue prominence to certain facts, ignoring other facts proved and of equal importance in a proper determination of the case, is improper.[66]

59—Ill. Linen Co. v. Hough, 91 Ill. 63; Vanslyck v. Mills et al., 34 Iowa 375.

60—Quinn v. Donovan, 85 Ill. 194.

61—Steinmeyer v. The People, 95 Ill. 383.

62—Carrington v. P. M. S. S. Co., 1 Cal. 475; Edwards v. Cary, 60 Mo., 572; Kendall v. Brown, 86 Ill. 387; Skiles v. Caruthers, 88 Ill. 458; W. C. Ry. v. Shulze, 217 Ill. 322, 75 N. E. 495.

63—Hartshorn v. Byrne, 147 Ill. 418, 35 N. E. 622.

64—L. S. & M. S. Ry. Co. v. Bodemer, 139 Ill. 596, 29 N. E. 692.

65—Niles v. Sprague, 13 Iowa 198.

66—Calef v. Thompson, 81 Ill. 478; Westchester F. I. Co. v. Earle, 33 Mich. 143; Jones v. Jones, 57 Mo. 138; Chose v. Buhl Iron Works, 55 Mich. 139, 20 N. W. 827.

Illustration: In Workman v. Dodd, 55 Ill. App. 597 (599), the following instruction was held erroneous for singling out evidence:

"The court instructs the jury that the deposit tickets in evidence showing deposits of plaintiff

An instruction which calls special attention to particular points in the evidence which are indecisive, and mere circumstances bearing upon an issue of fact, and omits all reference to other important circumstances in proof, is objectionable.[67]

§ 177. Instructions Should Not Be Repeated or Underscored in Places. It is necessary for the court to state the instructions but once, and any reiteration or repetition should be avoided; instructions should not be underscored in places for purpose of emphasis.[68] When the law applicable to a case is given in clear and intelligible language, the sole function of instructions is performed, and there is no necessity for repeating the same idea in different instructions, varying only in form. The court is not only under no obligation to permit a case to be argued through instructions, but it is bound to prohibit it.[69]

§ 178. When All Material Allegations Are Proved. Whenever all the material facts necessary to enable the plaintiff to recover are averred in the declaration, it is not improper for the court to instruct the jury that, if the facts alleged in the declaration have all been proved, the plaintiff is entitled to recover, unless the defendant has established by a preponderance of evidence some one or more of the special defenses pleaded.[70]

An instruction which tells the jury, if the plaintiff has made

to the credit of defendant are *prima facie* proof that the plaintiff deposited the money and checks specified therein to the credit of the defendant, the plaintiff is entitled to credit for such money and checks, unless the evidence shows that such money or checks were the property of the defendant at the time such deposits were made."

The court said: "We think this instruction given in behalf of appellee, which was directed exclusively to the deposit tickets, fatally erroneous. The tickets were competent testimony tending in connection with other testimony to show that appellee delivered to the bank money and checks to be credited to the appellant, but of themselves did not tend to prove that the funds deposited were the property of the appellee."

67—Graves v. Colwell, 90 Ill. 612; Chesney v. Meadows, 90 Ill. 430.

A particular witness should not be singled out by the court and his evidence commented upon in the instructions.

Sandwich v. Dolan, 141 Ill. 430, 31 N. E. 416; Graham v. Sadler, 46 Ill. App. 440.

68—State v. Cater, 100 Iowa 501, 69 N. W. 880.

69—Anderson v. Walter, 34 Mich. 113; Keeler v. Stuppe, 86 Ill. 309; I. & C. R. Co. v. Horst, 93 U. S. 91.

70—Amer. Cent. Ins. Co. v. Rothschild, 82 Ill. 166.

out his case as laid in his declaration, they must find for the plaintiff, is not liable to the objection that it makes the jury the judges of the effect of the averments in the declaration; it merely empowers them to determine whether the proof introduced sustains the averments made in the pleadings, which they may well do.[71]

§ 179. Abstract Propositions of Law Should Not Be Given, When. Instructions should be framed with reference to the circumstances of the case on trial, and not be expressed in abstract and general terms, when such terms may mislead instead of enlightening the jury.[72] Instructions containing mere abstract legal propositions without any evidence to support them, are calculated to mislead the jury, and should not be given.[73] The giving of an instruction stating an abstract principle of law in a criminal case is not an error, unless the principle stated is erroneous.[74]

§ 180. Should Not Submit Questions of Law to the Jury. It is error to give instructions to the jury which require them to find and determine legal propositions. The court should direct the jury what the law is on the facts which the evidence tends to prove; or instruct them what the law is, if they find the facts to be as alleged or claimed.[75]

71—O. & M. Ry. Co. v. Porter, 92 Ill. 437.

72—C. & A. Rd. Co. v. Utley, 38 Ill. 410; Parliman v. Young, 2 Dak. 175, 4 N. W. 139, 711.

73—Stein v. The City, etc., 41 Iowa 353; McNair v. Platt, 46 Ill. 211.

74—Upstone v. The People, 109 Ill. 169. There should be evidence upon which an instruction given can be based or the instruction should not be given. C. M. & St. P. Ry. v. O'Sullivan, 143 Ill. 48, 32 N. E. 398.

75—Mitchell v. The Town of Fond du Lac, 61 Ill. 174; Hudson v. St. Louis, etc., R. Co., 53 Mo. 525; Thomas v. Thomas, 15 B. Mon. (Ky.) 178.

Illustrations: When it appeared that there was a verbal contract between the plaintiff and another, the question as to what the contract was, was one of fact for the jury; but the question as to what the legal effect of it was, was a question of law and it was error to submit both these questions to the determination of a jury by instructions. White v. Murtland, 71 Ill. 250; Rohrabacker v. Ware, 37 Iowa 85; Lapeer, etc., Ins. Co. v. Doyle, 30 Mich. 159.

Whether a chattel mortgage is proved to have been duly acknowledged and recorded is a question of law for the court, and should not be submitted to the jury. Bailey v. Godfrey, 54 Ill. 507.

In an action against a railroad company for damages for injury to private property by the construction of its road upon a public

The instructions should contain the law of the case and to instruct the jury substituting this requirement as to what the law is by a reference, for instance, to an indictment from which the jury must determine what the essential elements of the crime may be, is held erroneous.

It is the duty of the court to interpret and give the legal effect of such documents.

§ 181. Jury Are Judges of Law and Facts in Criminal Cases, in Some States. While it is true, in the fullest sense, that a jury, in a criminal case, are the judges both of the fact and of the law, and may be so instructed by the court, they should then be left to their own responsibility alone to decide on the guilt or innocence of the prisoner, giving him the benefit of all reasonable doubts, without any reference to the possible future action of the court.[76]

In the case of *Schnier v. The People*, the court qualified the general instruction that "the jury are the judges of the law as well as of the facts," as follows:

"If the jury can say upon their oaths that they know the law better than the court does, they have the right to do so;

street, it was held to be error to instruct the jury to determine whether the company had constructed more tracks, or upon different lines, than were authorized by the city ordinances. The number of tracks thus authorized was a question of law, respecting which the court should have determined the legal rights of the parties. State v. McLaughlin, 170 Mo. 608, 71 S. W. 221 (224). This instruction would not be good in states where the jury are empowered to decide questions of law as well as of fact. State v. Hopkins, 56 Vt. 250; State v. Horn, 115 Mo. 416, 22 S. W. 381; Dolan v. State, 44 Neb. 643, 62 N. W. 1090; Carleton v. State, 43 Neb. 373, 61 N. W. 699; Metz v. State, 46 Neb. 547, 65 N. W. 190; Pjarrou v. State, 47 Neb. 294, 66 N. W. 422; Barton v. Gray, 57 Mich. 622, 24 N. W. 638; People v. Cummins, 47 Mich. 334, 11 N. W. 184, 186; People v. Murray, 72 Mich. 10, 40 N. W. 29; State v. Brainard, 25 Iowa 572; Tittle v. State, 35 Tex. Cr. App. 96, 31 S. W. 677; Anderson v. State, 34 Tex. Cr. App. 546, 31 S. W. 673, 53 Am. St. Rep. 722; Moore v. State, — Tex. Cr. App. —, 33 S. W. 980; Territory v. Baca, 11 N. M. 559, 71 Pac. 460 (461); Territory v. Nichols, 3 N. M. (Gild.) 109, 2 Pac. 78; Territory v. Friday, 8 N. M. 204, 42 Pac. 62; Territory v. Vialpando, 8 N. M. 211, 42 Pac. 64; Territory v. Lerno, 8 N. M. 570, 46 Pac. 16; State v. Taylor, 118 Mo. 153, 24 S. W. 449; State v. Banks, 73 Mo. 592; State v. Palmer, 88 Mo. 572; State v. Donohoe, 78 Iowa 486, 43 N. W. 297.

76—Falk v. The People, 42 Ill. 331; Schnier v. The People, 23 Ill. 17.

but before assuming so solemn a responsibility they should be sure that they are not acting from caprice or prejudice; that they are not controlled by their will or their wishes, but from a deep and confident conviction that the court is wrong and that they are right. Before saying this upon their oaths it is their duty to reflect whether, from their habits of thought, their study and experience, they are better qualified to judge of the law than the court. If, under all these circumstances, they are prepared to say that the court is wrong in its exposition of the law, the statute has given them the right."[77]

§ 182. Instructions Should Be Concerned with Matters of Law Exclusively. The instructions of the court should be concerned with matters of law exclusively, leaving to the jury the question of facts. The assumption by the court of the existence of material facts when there is a conflict in the evidence, would be error.[78] Nor, on the other hand, should the judge assume that certain facts do not exist when there is some evidence on that point.[79]

The jury should be left as far as possible to form their own opinions upon the evidence.[80] The apparent statement of the opinion of the court would be prejudicial in invading the province of the jury and influencing their opinion, if there is any conflict in the evidence and the point in dispute has evidence for as well as against it equal in weight.[81] The weight and sufficiency of the evidence should not be commented upon.[82] Nor should an instruction upon the effect of the evidence be given by the court of its own motion, even though the credibility of such evidence be submitted to the jury.[83]

77—Schnier v. The People, 23 Ill. 17. See, also, Mullinix v. The People, 76 Ill. 211.

It has been well said: "There is a species of equity in the administration of law by a jury when they are the sole judges of law and fact that would not control a court. They will convict an assassin, but not the girl who kills her seducer, convict the murderer for money, but not one who kills the invader of his home, and when in righteous anger a mob lynches a beast, the jury will not convict them."

78—Kennedy v. Rosier, 71 Iowa 671, 33 N. W. 226.

79—Roach v. Parcell, 61 Iowa 98, 15 N. W. 866.

80—Landon v. People, 133 Ill. 382, 24 N. E. 874.

81—Swigart v. Hawley, 140 Ill. 186; Waldron v. Alexander, 136 Ill. 550, 27 N. E. 41.

82—Thorp v. Craig, 10 Iowa 461.

83—Parker v. Daughtry, 111 Ala. 529, 20 So. 362.

The charge of the court to the jury should be strictly confined to matters of law, and it is er-

§ 183. Jury to Take Law from the Court. The jury should regard the law as given by the court. It is their duty to do so. If the court errs in giving the law, the parties are not without remedy. They have the right and privilege of having it corrected. When jurors take the law otherwise than from the court, justice is not carried out according to law and the courts may as well be closed.[84]

§ 184. Use of Metaphors and Latin Words in Instructions. Instructions should be in plain, terse English, so that the man of ordinary comprehension may understand. The use of metaphors should be avoided. To speak of a chain of circumstantial evidence is an expression used and found in law books, but it is a metaphor and not strictly accurate.

When the words "*quo animo*" were used in an instruction the court refused the instruction upon the grounds that it embodied words which were not contained in the English language, and which the members of the jury might not understand, though the instruction asked embodied a correct principle of law, which should have been, but was not set out, in the charge.[85]

§ 185. Error in Admitting Evidence, How Obviated. If incompetent evidence is permitted to be introduced, which the court afterwards instructs the jury not to consider, no prejudice is wrought by its introduction.[86]

When Not Obviated. An error in the admission of evidence is not obviated by an instruction to disregard such evidence, unless the case is such that it clearly appears no injustice or wrong has been done to the party complaining.

§ 186. Repetitions Occurring in Instructions. It is not always possible to frame a series of instructions in which no repetitions occur. The courts do not incline to criticise such defects severely. However, it is held error to repeat the same propositions many times in a single instruction, although the

roneous for the judge to tell the jury what facts are proved and what are not. The court may instruct the jury what is evidence, but not what it proves.

Russ v. Steamboat, etc., 9 Iowa 374; Thompson v. Hovey, 43 Ill. 198; Wannock v. Mayor, etc., 53 Ga. 162.

84—State v. Petsch, 43 S. C. 132, 20 S. E. 993 (995).

85—Rayburn v. State, 69 Ark. 177, 63 S. W. 356 (357); State v. Helm, 92 Iowa 540, 61 N. W. 246 (248).

86—Cook et al. v. Robinson, 42 Iowa 474; Howe, etc., Co. v. Rosine, 87 Ill. 105.

phraseology and language are slightly varied. Such repetitions have the tendency to unduly emphasize certain points and on this ground may be considered erroneous.[87]

§ 187. Instructing the Jury to Disregard Certain Evidence. An instruction should not signify to the jury any particular evidence to follow or not to follow;[88] unless such evidence has been improperly admitted and is incompetent for any purpose in the case. The court may, however, instruct the jury upon the limitations of evidence before them,[89] and to disregard evidence which has been admitted upon the statement of counsel that he expected to make it relevant, but failed to do so.[90] It has also been held to be within the compass of instructions to cure errors made by the court in the admission of evidence by withdrawing such evidence from the consideration of the jury.[91] Evidence admitted without objection cannot be excluded from the consideration of the jury by instructions.[92]

§ 188. Effect of Evidence, Limited by Instructions. If evidence is admitted competent for one purpose which may have an improper effect, the party aggrieved should ask an instruction explaining its legitimate effect. It is improper, however, to single out particular evidence for comment and the very force and pertinence of such intimations from the court would justify the granting of a new trial.[93]

§ 189. When Erroneous Instructions Are Not Held Prejudicial. Instructions that are erroneous have not been held to be prejudicial unless it affirmatively appears that they are so.

87—Shenikeeberger v. State, 154 Ind. 630, 57 N. E. 519 (524). Where the statement that each juror must be satisfied beyond a reasonable doubt was repeated three times.

88—Cable v. Grier, 45 Ill. App. 407.

89—Jamison v. People, 145 Ill. 357, 34 N. E. 486.

90—Matthews v. Reinhardt, 149 Ill. 635, 37 N. E. 85.

91—Jones v. U. S. Mut. Acc. Assn., 92 Iowa 652, 61 N. W. 485; Becker v. Becker, 45 Iowa 239.

92—Prior v. White, 12 Ill. 261; Allison v. C. & N. W. R. R. Co., 42 Iowa 274.

93—Blumenthal v. State, 121 Ga. 477, 49 S. E. 597 (598).

The court said that the very force and pertinence of the intimation requires the grant of a new trial, citing Moody v. State, 114 Ga. 449, 40 S. E. 242; Rawls v. State, 114 Ga. 449, 22 S. E. 529; Davis v. State, 91 Ga. 167 (2), 17 S. E. 292; Bradley v. State, 121 Ga. 201, 48 S. E. 981; Cobb v. State, 76 Ga. 664.

An argumentative instruction, otherwise correct, will not be ground for reversal. Where a jury were instructed that if satisfied beyond a reasonable doubt of defendant's guilt, they owed it to the community to find him guilty. The court held that although argumentative, as it contained a correct statement of the law, it was not reversible.[94]

§ 190. Error Will Not Always Reverse. Where it appears, from the evidence, that a verdict is so clearly right that had it been different the courts should have set it aside, such verdict will not be disturbed merely for the reason that there is error found in the instruction.[95] The refusal of instructions, which, though containing correct propositions, could not, in view of all the facts developed by the evidence, have prejudiced the party complaining, will not operate to reverse the case.[96]

§ 191. When Error Will Reverse. When a case is close in its facts, or when there is a conflict in the evidence on a vital point in the case, the rights of parties cannot be preserved unless the jury are accurately instructed.[97] An instruction which has a tendency to, and probably did, mislead the jury when taken singly, is erroneous, even though the instructions, when taken together, embrace the law of the case.[98]

§ 192. Must Be Construed in Connection with the Evidence. A charge given by the court must be construed in connection with the evidence in the case. It is sufficient if the instructions are correct when considered with reference to the case upon trial and the facts sought to be established.[99]

§ 193. Should Be Given When There Is Any Evidence, etc. When the evidence tends to prove a certain state of facts, the party in whose favor it is given has a right to have the jury instructed on the hypothesis of such state of facts, and leave

94—Whitney v. Brownewell, 71 Iowa 251, 32 N. W. 285; Thompson v. State, 122 Ala. 12, 26 So. 144.

95—Lundy v. Pierson, 83 Ill. 241; Burling v. Ill. Cent. Rd. Co., 85 Ill. 18; Phillips v. Ocmulgee, etc., 55 Ga. 633; People v. Welch, 49 Cal. 177.

96—Cross v. Garrett, 35 Iowa 480; Cook et al. v. Robinson, 42 Iowa 474.

97—Toledo, etc., Ry. Co. v. Shuckman, 50 Ind. 42; Wabash Rd. Co. v. Henks, 91 Ill. 406.

98—Price v. Mahoney, 24 Iowa 582; Pittsburg, etc., Ry. Co. v. Krouse, 30 Ohio St. 223; Mackey v. People, 2 Col. T. 13; Murray v. Com., 79 Pa. St. 311.

99—State v. Downer, 21 Wis. 275; Huffman v. Ackley, 34 Mo. 277.

it to the jury to find whether the evidence is sufficient to establish the facts supposed in the instruction. If the instructions are pertinent to any part of the testimony, they should, if correct, be given without regard to the amount of evidence to which they apply.[100]

When an instruction is asked upon a question concerning which there is no direct testimony, yet if there be any proof tending to establish it, such question should be submitted to the jury, as the party asking the instruction is entitled to the benefit of whatever inference the jury may think proper to draw from the proof, however slight.[1]

§ 194. Instructing What Evidence Tends to Prove. An instruction which tells the jury that they may consider certain evidence as tending to prove a particular fact, making no comment as to its weight or effect, is not for that reason improper. But the expression in an instruction indicating an opinion as to the weight of the evidence would be improper.[2]

§ 195. Should Not Be Argumentative. It is erroneous to give an instruction which is more in the nature of an argument than a statement of the law governing the case, giving undue prominence to facts relied upon, and reciting facts having no tendency to support the theory presented.[3]

§ 196. Should Not Ignore Facts Proven. When there is evidence tending to prove a fact having an important bearing upon the law of the case, though strongly contradicted, an instruction is erroneous which ignores the existence of such fact, and takes its consideration from the jury.[4]

§ 197. Must Not Prejudice or Favor Either Party. It is not every instruction which is sound in law that the court is bound to give and an instruction which might unduly and improperly

100—Griel v. Marks, 51 Ala. 566; State v. Gibbons, 10 Iowa 117; Kendall v. Brown, 74 Ill. 232; Jones v. C. & N. W. R. Co., 49 Wis. 352, 5 N. W. 854.

1—Peoria Ins. Co. v. Anapow, 45 Ill., 87; Flournoy v. Andrews, 5 Mo. 513; Camp v. Phillips, 42 Ga. 289; C. & W. I. R. R. Co. v. Bingenheimer, 116 Ill. 226, 4 N. E. 840.

An instruction should not ignore any material facts involved in the controversy, provided there is some evidence concerning it. C. M. & St. P. Ry. Co. v. O'Sullivan, 143 Ill. 48, 32 N. E. 398.

2—Beattie v. Hill, 60 Mo. 72.

3—Ludwig v. Sager, 84 Ill. 99; Thorpe v. Growey, 85 Ill. 612; Reynolds v. Phillips, 13 Ill. App. 557; Am. B. Soc. v. Price, 115 Ill. 628, 5 N. E. 126.

4—Chicago P. & P. Co. v. Tilton, 87 Ill. 547.

tend to prejudice the adverse party may be refused.[5] If an instruction states a case upon which the plaintiff is entitled to recover it should also contain such matters of defense which may be put in evidence as would defeat such a claim.[6]

An instruction should be equally fair to both sides, and a question should not be submitted to the jury concerning the responsibility of one party without submitting also the responsibility of the adverse party.[7] When the court directs the attention of the jury to the facts, it should refer them to all the facts bearing upon the issues, so as to present the case fairly for both parties.[8] An instruction which undertakes to give a summary of the principal facts, but directs the attention of the jury only to those favorable to one of the parties, leaving out of view all that tends to illustrate the theory of the other party is objectionable.[9]

§ 198. Jury Must Believe from the Evidence Alone. The findings of the jury should be required to be upon the evidence in the case,[10] and the jury should be instructed to believe from the evidence alone.[11] This refers, of course, to the evidence which has not been stricken out by the court.[12] An instruction which does not require the jury to "believe from the evidence" the facts assumed in it, is objectionable, even if the law in the instruction is correctly stated.[13]

It is not necessary that a jury should be told in each sentence of an instruction that they should believe from the evidence. If the first part of the instruction contains this clause a jury of intelligent men will not be misled if it is omitted in the remaining portion.[14]

It is error to instruct the jury that it is necessary for the plaintiff to prove a material fact, or that it should be made to appear from the evidence "*to the satisfaction of the jury.*" The jury in a civil case are to decide facts upon the weight or

5—Bunker Hill v. Pearson, 46 Ill. App. 47.

6—Waller v. Lasher, 37 Ill. App. 609.

7—Swigart v. Hawley, 140 Ill. 186, 29 N. E. 883.

8—Cushman v. Cogswell, 86 Ill. 62; Snyder v. The State, 59 Ind. 105.

9—Evans v. George, 80 Ill. 51; Newman v. McComas, 43 Md. 70.

10—P. D. & E. Ry. v. Johns, 43 Ill. App. 83.

11—L. S. & M. S. Ry. v. Rohlfs, 51 Ill. App. 215.

12—Con. Coal Co. v. Haenni, 146 Ill. 614, 35 N. E. 662.

13—Parker v. Fisher, 39 Ill. 164.

14—Gizler v. Witzel, 82 Ill. 322.

preponderance of the evidence, even though the proof does not show such facts to their satisfaction.[15]

§ 199. Should Be Based on the Evidence. The instructions in all cases should be based on the evidence, and not on the facts of which there is no evidence.[16] An instruction is properly refused when there is no evidence tending to prove the hypothetical state of facts to which it relates.[17]

It is error to give an instruction denying a party's right upon an assumed state of facts not shown by the evidence, and calculated to give the jury to understand that, as a matter of law, the party under the contract was bound in a certain way not shown by the evidence.[18]

An instruction, in an action of trespass for an assault and battery, that the jury are the sole judges of the amount of damages that the plaintiff should recover, without stating that the damages should be estimated from the evidence, is erroneous.[19]

The jury should not be instructed in an action of trespass, that they may give punitive damages if they believe from the evidence the trespass was committed wantonly or willfully, where there are no circumstances of wantonness or willfulness to warrant such an instruction.[20]

It is error to tell the jury that it is their duty to assess damages if they believe in certain facts. Whether a plaintiff has sustained damages, and if so, how much, is a question to be determined by the jury; and it is proper for the court to instruct them that if they believe certain facts they may, or they

15—Stratton v. Cent. City Horse Ry. Co., 95 Ill. 25.

In Isaac v. McLean et al., 106 Mich. 79, 64 N. W. 2, the court instructed the jury that they were to determine the amount of property taken, and its fair market value, and the only objection is that the words "from the evidence" or "under the evidence" were not used in that connection. "It might with equal propriety be urged that no instruction was given as to the preponderance or burden of proof, or that the jury must be governed by the law as given by the court. It cannot be said that in a civil case the omission to instruct as to matters common to all cases is reversible error."

16—Eli v. Tallman, 14 Wis. 28; Hill v. Canfield, 56 Pa. St. 454; Howe S. Mch. Co. v. O. Laymen, 88 Ill. 39; Atkins v. Nicholson, 31 Mo. 488.

17—C., B. & Q. R. R. Co. v. Dickson, 88 Ill. 431.

18—Harrison v. Cachelin, 27 Mo. 26; Frantz v. Rose, 89 Ill. 590; Swark v. Nichols, 24 Ind. 199; Bogle v. Kreitzer, 46 Pa. St. 465.

19—Martin v. Johnson, 89 Ill. 537.

20—Waldron v. Marcier, 82 Ill. 550; Wenger v. Calder, 78 Ill. 275.

are at liberty to, assess damages, but not that it is their duty to do so.[21]

§ 200. Instructing the Jury That They Are the Exclusive Judges of the Facts. Whenever the expressions of the court in the instructions might lead the jury to perceive the opinion of the court and there is danger of its influencing and prejudicing the jury, the party should ask the court to instruct the jury that they are the exclusive judges of the facts.[22] The following instruction has been approved:

"The jury are instructed that neither by this instruction or the special interrogatories, nor by any words uttered or remark made by the court during this trial, does or did the court, intimate, or mean to give, or wish to be understood as giving, an opinion as to what the proof is or what it is not, or what are the facts in this case or what are not the facts therein. It is solely and exclusively for the jury to find and determine the facts, and this they must do from the evidence, and, having done so, then apply to them the law as stated in these instructions."[23]

§ 201. Should Be Clear, Accurate and Concise. Instructions should, in a clear, concise and comprehensive manner, inform the jury as to what material facts must be found in order to recover, or to bar a recovery. They should never be argumentative, equivocal or unintelligible to the jury.[24] Instructions should always be clear, accurate and concise statements of the law as applicable to the facts of the case. It was never contemplated, under the provision of the practice act, that the

21—Chi. and N. W. Ry. Co. v. Chisholm, 79 Ill. 584.

22—Bonniss v. Felsing, 97 Minn. 227, 106 N. W. 909.

23—N. C. St. R. R. Co. v. Kaspers, 186 Ill. 246, affg. 85 Ill. App. 316, 57 N. E. 849.

In comment the court said: "The objection made to this instruction is, that it gave the jury to understand that they were independent of the law. The ultimate questions of the care of the plaintiff and negligence of defendant were to be determined by the jury by applying the law as stated in the instructions to the facts as proved by the evidence, and it would be error to give an instruction impressing upon them their independence of the law (Ludvig v. Sager, 84 Ill. 99), but we do not think the instruction is subject to that criticism. It directs the jury to find and determine the facts from the evidence, and to apply to such facts the law as stated in the instructions. It is correct as a proposition of law."

24—Moshier v. Kitchel, 87 Ill. 19; Loeb v. Weis, 64 Ind. 285.

court should be required to give a vast number of instructions, amounting in the aggregate to a lengthy address; such a practice is mischievous, and ought to be discountenanced. A few concise statements of the law applicable to the facts, is all that can be required, and all that can serve any practical purpose in the elucidation of the case.[25]

§ 202. Should Be Clear and Unequivocal, Not Contradictory. Instructions should be as clear and unequivocal as possible;[26] if numerous and involved the jury is confused thereby, rather than enlightened.[27] It has been held that the giving of instructions in the language of the statute was not error, when a statute defines an offense, word or term. If the instructions contain contradictory rules and there is no way of determining which of these rules the jury followed, it would be reversible error.[28]

§ 203. Jury Should Consider All the Evidence, but Need Not Be So Instructed. The jury should consider all of the evidence given at the trial, giving to each part of it the weight to which they may consider it entitled under all the circumstances, but the court need not necessarily instruct them upon this point. While the jury are concerned only with the evidence given in the case it has been held not improper for the court to instruct the jury relative to the arguments of counsel and the decision of the jury as being based in any manner on the eloquence of the pleas.[29]

§ 204. Should Not Instruct Upon Immaterial Matter; Must Be Prejudicial to Be Reversible Error. The court is not required to give an instruction upon an immaterial matter, not directly involving the main issues in the case,[30] but the giving of an instruction which in no way is relevant to the matters

25—Adams v. Smith, 58 Ill. 417; Trish v. Newell, 62 Ill. 196; State v. Mix, 15 Mo. 153; Kraus v. Thieben, 15 Ill. App. 482.

26—W. C. St. Ry. Co. v. Groshon, 51 Ill. App. 463.

27—Betting v. Hobbett, 42 Ill. App. 174.

28—Skeen v. Chambers — Utah —, 86 Pac. 492-494. 11 Enc. Pl. & Prac. 205; Duncan v. People, 134 Ill. 110, 24 N. E. 765; Long v. State, 23 Neb. 33, 36 N. W. 310; People v. Biddlecome, 3 Utah 208, 2 Pac. 194; State v. Hartzell, 58 Iowa 520, 12 N. W. 557.

29—Lowden v. Morrison, 36 Ill. App. 495; Normal v. Bright, 223 Ill. 99, 79 N. E. 90; Shield v. Wyndham, 123 Ill. App. 228; Houtz v. People, 123 Ill. App. 445; State v. Evans, 88 Minn. 262, 92 N. W. 976.

30—Tuck v. Singer Manufacturing Co., 67 Iowa 576, 25 N. W. 812.

in evidence, although correct in law, is not improper unless it is shown that it in some manner prejudiced the party with the jury.[31]

§ 205. Should Not Compromise Between Liability and the Amount of Damages. The court may with propriety give cautionary instructions on this subject, and the following has been approved:

"The court instructs the jury that they have no right to compromise in their verdict between the question of liability and the amount of damages, for if they shall find that according to law, as stated to them in the instructions of the court, under the evidence in the case, the defendant is not liable, then the plaintiff is not entitled to any damages, and it is the duty of the jury to so find by their verdict; and the jury must not arrive at their verdict by lot or by chance; and no juror should consent to a verdict which does not meet with the approval of his own judgment and conscience, after due deliberation with his fellow jurors, and fairly considering all of the evidence admitted by the court, and the law, as stated in the instructions of the court."[32]

§ 206. Jury Bound to Follow Instructions; Effect of Disobedience. The jury are in duty bound to follow all instructions of the court and while this included the duty to obey the order of court to find a verdict, as directed, the modern practice practically eliminates all possibility of the jury disobeying the instructions of the court in this respect. A refusal of the jury to follow the instructions of the court will be a sufficient cause for the reversal of the case, however.[33]

§ 207. Right to See Instructions Requested by Opponent. No communications should be had by one party to the suit with the judge excepting where the other side may have the right to know the same, and for this reason it is the right of a party to know what instructions have been handed to the court by his adversary.

§ 208. Party Not Always Entitled to an Instruction in the Form Requested. Requested instructions may be rejected by the court when incorrect, or when they present questions not involved in the case, for a party is not entitled to an instruc-

31—McGregor v. Armill, 2 Iowa 30.

32—C. & A. Ry. Co. v. Kirkland, 120 Ill. App. 272, 275; Birmingham F. Ins. Co. v. Pulver, 126 Ill. 329, 18 N. E. 804.

33—Boske v. Collopy, 86 Ill. App. 268.

tion in the very form in which he presents it.[34] The better practice seems to be for the court to give instructions drawn by himself rather than use the instructions requested by the parties, as they are more likely to be partisan in their nature and framed in the interest of the parties than the instructions of the court.[35]

§ 209. Not Error to Refuse Requested Instructions Already Included in Those Prepared by the Court. A party has a right to submit requests to the court for instructions bearing on material parts of his case, and to have the court give the same to the jury, unless the same are included in the instructions which the court has himself prepared.[36] It is error for the court to reject proper instructions requested unless the court should in place thereof give the jury instructions covering the same points but in a different form than those requested.[37]

The instructions of the court may have the advantage of being more concise and logical than the various loosely-drawn instructions presented by the parties on both sides. The court may, however, in its discretion, or where, for want of time, it could not prepare instructions of its own, give the instructions as presented by the parties without change.[38]

The refusal of instructions requested, which are fully covered by other instructions given, does not constitute error.[39] That the refused instruction is correct will not take it out of the rule, where its substance is embodied in other instructions given.[40]

§ 210. Number of Instructions Limited by Court. The right of a party to ask instructions must have some limit and the Supreme Court will not sustain an abuse of this right.[41] Error in limiting instructions will not be considered where no exception or objection was taken and when no instructions were offered in excess of the number limited,[42] and to refuse to give

34—B. & O. Ry. Co. v. Schultz, 43 O. St. 270, 1 N. E. 324.

35—Chicago v. Moore, 139 Ill. 201, 28 N. E. 1071.

36—O'Neil v. Dry Dock B. R. Co., 129 N. Y. 125, 29 N. E. 84.

37—Chicago v. Moore, 139 Ill. 201, 28 N. E. 1071.

38—Cook v. Brown, 62 Mich. 473, 29 N. W. 46.

39—J. H. Cowin Glove Co. v. M. D. T. Co., 130 Iowa 327, 106 N. W. 749; Hirts v. Eastern Wis. R. and Light Co., 127 Wis. 230, 106 N. W. 1068.

40—Whitney & Starrette Co. v. O'Rourke, 172 Ill. 177, 50 N. E. 242; W. C. R. R. Co. v. Lieserowitz, 197 Ill. 607, 617, 64 N. E. 718.

41—Fisher v. Stevens, 16 Ill. 397; Wright v. Ames, 28 Minn. 362, 10 N. W. 21.

42—The Fair v. Hoffman, 209 Ill. 330, 70 N. E. 622.

instructions asked for, however correct or applicable, is not erroneous, if they have in substance already been given in the charge of the court.[43]

§ 211. The Giving of Further Instructions Is in the Discretion of the Court. When the jury, in a criminal case, return into court and say that they cannot agree, it is competent for the court, of its own motion, to give them any additional instruction, proper in itself, which may be necessary to meet the difficulties in their minds.[44]

A fresh discussion of the law or the evidence, on the part of counsel in the presence of the jury, cannot be had, unless

43—State v. Stanley, 33 Iowa 526; Cramer v. The City of Burlington, 42 Iowa 315; Scott v. Delaney, 87 Ill. 146; Crisman v. McDonald, 28 Ark. 8; Olive v. The State, 11 Neb. 1, 7 N. W. 444.

In I. C. R. R. Co. v. Chi. T. & T. Co., 79 Ill. App., 623, 631, the court says: "Appellant's counsel asked thirty-nine instructions thirteen of which, some of them modified, were given, and the remainder refused. Counsel now objects to the modification of the instructions modified, and the refusal of those refused. We decline to pass on these objections. Such a large number of instructions in such a case as this is wholly unnecessary, tends to confuse rather than enlighten the jury, and also to increase the chances of error, which latter, we are inclined to think, is not infrequently the object sought to be attained by counsel. The practice of asking a large number of instructions has been severely criticised by the Supreme Court, the court saying, among other things, 'It is a mischievous practice and should be discontinued.'" See also Chi. Ath. Assn. v. Eddy, 77 Ill. App. 204, and Adams v. Smith, 58 Ill. 417.

In Duthie v. Town of Washburn, 87 Wis. 231, 58 N. W. 380, 382, the court said that the "practice of giving long charges to the jury has grown into an evil, and to this practice may well be attributed the various objections above noticed. Instructions to the jury should be clear and explicit and to the point, and so brief as to be emphatic. The language should be well selected to express with exactness and clearness the legal principle in view, and the words be apt and appropriate. There is nothing that should be expressed with more terseness, brevity and accuracy than legal principles. These rules may as well be applied to judicial opinions as to instructions to a jury. Repetition, verbosity, long and involved sentences, and numerous and pointless examples, analogies and illustrations, should be avoided in either case. The briefer, well-expressed and proper instructions are, the more readily the jury will understand and longer remember them."

44—State v. Pitts, 11 Iowa 343; Hogg v. State, 7 Ind. 551.

allowed by the judge, in his discretion; nor is the judge required to give additional instructions at the request of either party. In such matters much must be left to the discretion of the judge.[45] After a jury retire to consider their verdict and come into court for further instructions, it is irregular to give such instructions in the absence of a party.[46]

The court should not give instructions to the jury after they have retired to consider their verdict, unless the parties or their attorneys have been notified, and such action is reversible error, unless it is shown that no prejudice resulted.[47] It is held, however, that the sending for counsel in such a case is but an act of courtesy by the court, and not a legal duty.[48] In a case where no instructions were offered by either party, it was held proper for the court to orally instruct the jury that they must find the amount of damages, where they had returned a verdict without fixing the amount and to order them to return to the jury-room for this purpose.[49]

§ 212. The Jury May Come in for Further Instructions. A jury may be called into court for further instructions, either by agreement of counsel, or at their own request.[50] If the jury should find an insufficient verdict, the court may send them out under instructions to find formally and fully, so as to determine the rights of the parties.[51]

§ 213. Instructions Taken by the Jury upon Retirement. Written instructions are as a general rule allowed to be taken with the jury upon their retirement.[52] In some states it is held improper to allow the jury to take with them the instructions of the court, which are reduced to writing, but this occurred only in a case where the instructions were not given to the jury until after they had retired.[53]

§ 214. When the Jury May Take the Pleadings upon Retirement. Pleadings are drawn in technical language and con-

45—Nelson v. Dodge, 116 Mass. 367.

46—Davis v. Fish, 2 G. Gr. 447; O'Connor v. Guthrie et al., 11 Iowa 80; Campbell v. Beckett, 8 Ohio State 210; Hoberg v. State, 3 Minn. 262.

47—Kizer v. Walden, 96 Ill. App. 593.

48—Heenan v. Howard, 81 Ill. App. 629.

49—Chapman v. Salfisberg, 104 Ill. App. 445.

50—State v. Pitts, 11 Iowa 343; Lee v. Quirk, 20 Ill. 392; O'Shields v. State, 55 Ga. 696; Farley v. State, 57 Ind. 331.

51—Flinn v. Barlow, 16 Ill. 39.

52—Smith v. Holcomb, 99 Mass. 552.

53—Smith v. McMillen, 19 Ind. 391.

tain matter which may have been withdrawn, and sometimes has matter pregnant with denunciations and adjectives that might sway or influence the jury.[54] It is not always easy for the court itself to understand the pleadings and certainly it would be too much to expect that the jury would not misunderstand them.

In some states it has been held to be proper to allow the jury to take with them the pleadings to the jury-room, although they are drawn for the guidance of the court rather than for the jury.[55] In the state of Minnesota it is held that the court may permit a jury to take the pleadings with them to the jury-room when there is any special reason therefor, but that this was of doubtful propriety.[56]

In the state of Illinois the rule seems to be that the jury may be allowed to take the pleadings with them when they retire to consider their verdict if the parties so request, but this rule does not include pleadings which have been stricken from the files by demurrer, or otherwise eliminated.[57] Where a count of a declaration has been withdrawn it should not be submitted to the jury,[58] but where a count was withdrawn by one of the parties in the presence of the jury it cannot be said, as a matter of course, that the jury were prejudiced and misled by being allowed to take the whole declaration with them.[59]

§ 215. Law Books, etc., Should Not Be Taken to Jury-Room. Law books should not be taken to the jury-room, either by the jury or anyone else,[60] and it is even held that a copy of the state statutes in the jury-room during deliberation was a sufficient cause for reversing the verdict. Nor should scientific books be allowed,[61] nor even a city directory.[62]

§ 216. Depositions and Other Papers Taken by the Jury upon Retiring. Generally all papers which are duly admitted in evidence may properly go to the jury, but it is within the power of the court to withhold them in the exercise of

54—Swanson v. Allen, 108 Iowa 419, 79 N. W. 132.

55—Dorr v. Simerson, 73 Iowa 89, 34 N. W. 752.

56—Mattson v. Minn. & N. W. Ry. Co., 98 Minn. 290, 108 N. W. 517.

57—Village of N. Peoria v. Rogers, 98 Ill. App. 355.

58—Trumbull v. Trumbull, 98 N. W. 683.

59—W. C. St. Ry. Co. v. Buckley, 200 Ill. 260, 65 N. E. 708.

60—Merrill v. Nary, 10 Allen 416.

61—State v. Gillick, 10 Iowa 98.

62—U. S. v. Horn, 5 Blatchford, 105.

sound discretion, but no exception will lie to the ruling in this regard.[63] This holds true of all papers and documents unless otherwise provided by statute. Depositions are, however, excepted.[64] The courts do not allow deposition to be taken by the jury upon retirement to deliberate upon their verdict, for the reason that being a part of the testimony they ought not receive a greater emphasis than the other parts. This is true of pleadings also, where portions of them are underscored so as to call particular attention thereto.

It has been held, however, that books containing memoranda attached to the depositions are competent and independent evidence and the jury may take them with them upon retirement when detached from the depositions.[65] And it has been held proper to send papers to the jury-room even after the jury had retired for deliberation.[66]

§ 217. Permitting the Jurors to Make Memoranda of the Evidence. In some states it is held proper for the jurors to make memoranda of the evidence or arguments and to take them with them to the jury-room to assist them in the consideration of the evidence.[67] In Indiana, however, the court held that jurors would be too apt to depend on their own memorandum and to give it undue prominence to the exclusion of the other parts of the evidence, and for that reason it was held error to permit the jury to take such notes with them on retirement.[68]

§ 218. Introducing Further Evidence after Retirement of Jury or After Verdict. Although the case is under advisement by the jury, the trial court may, in its discretion, permit further evidence in special exigencies.[69]

A rendering of further evidence after the verdict could only be done by asking for a new trial as the case is closed at least for that trial. If the case, however, was one in Chancery it would seem possible and entirely proper for the court to hear

63—Burghardt v. Van Beusen, 86 Mass. 374; Standard Starch Co. v. McMullen, 100 Ill. App. 82.

64—Standard Starch Co. v. McMullen, *supra*.

65—Standard Starch Co. v. McMullen, *supra*.

66—Smith v. Holcomb, 99 Mass. 552.

67—Rickenan v. Williamsburg C. F. Ins. Co., 120 Wis. 655, 98 N. W. 960.

68—Cheek v. State, 35 Ind. 492.

69—Meadows v. Ins. Co., 67 Iowa 57, 24 N. W. 951; McComb v. Ins. Co., 83 Iowa 247, 43 N. W. 1038; Meserve v. Folsom, 62 Vt. 504, 20 Atl. 926.

such further testimony and if necessary reconsider his judgment.

§ 219. **Protraction of Trial over Night.** Under extraordinary circumstances, a court may protract a trial during the whole or a part of the night, but in the absence of special reasons justifying it is held to be an unjust and unusual proceeding and to do this constitutes a great abuse of discretion.[70]

70—McGonn v. Campbell, 28 Kan. 30.

CHAPTER XII.

ARGUMENT OF COUNSEL TO THE JURY—TIME FOR ARGUMENT LIMITED BY THE COURT—FREEDOM OF SPEECH—IMPROPER REFERENCES IN ARGUMENT.

§ 220. **The Right to Argue the Case to the Jury.** The right to be heard by counsel in argument may be said to be universally conceded; it is not a question of discretion for the court, but an absolute legal right, not absolute, perhaps, in the sense that a right to appear and defend by counsel is absolute and which cannot be taken away from a party, but dependent on the fact that there is something to argue, something in dispute, or, in other words, a debatable question.

§ 221. **Refusal of the Court to Listen to Argument.** The trial court may refuse to listen to the most respectful argument on the ground that it is infallible in judgment and that there is no possibility of it being in error. Such arrogance and arbitrariness is inexcusable and even more so, when the court prevents a full presentation and argument of the case to the jury. There can be no excuse for the refusal of the court to allow a litigant to have a full presentation of his case in argument to the court or to the jury. While an attorney is truly an officer of the court, owing certain duties and obligations thereto, he is also under engagements of responsibility to his client. The interests of the client are paramount to all other considerations. It is to this end that the whole machinery of the court, judge, jury and counsellor exist.

A licensed attorney is an officer of the court and as such has the duty and privilege of aiding and assisting the court on the matters of the trial and in the settlement of questions of law. For this reason courts have assumed the right to dispense with arguments of counsel to itself, as it may properly refuse to receive unnecessary help, but this by no means follows when the argument is made to the jury.

In all cases, whether civil or criminal, but especially in criminal cases, this right is of high order and is guaranteed under the federal constitution and many of the state constitutions.

Whenever there is a case for the jury there is an absolute right to argue the same by counsel and to deprive a party of it would constitute error.[1] Counsel who represent defendant only for the purpose of moving for a continuance and arguing

1—Mayo v. Wright, 63 Mich. 32; Cartwright v. Clopton, 25 Ga. 85; Lanan v. Hibbard, S., B. & Co., 63 Ill. App. 54; Hettinger v. Beiler, 54 Ill. App. 320; Zweitusch v. Lowy, 57 Ill. App. 106; Douglas v. Hill, 29 Kas. 527; Kintz v. Starkey, 70 Ill. App. 53; Nedig v. Cole, 13 Neb.

a demurrer have no right to argue the case upon its merits to the jury at the close of plaintiff's testimony.[2]

§ 222. Licensed Attorneys Alone Entitled to This Right. To be entitled to this right it is usually required either that the person be a party to the suit or a regularly licensed attorney appearing in his behalf. It is held improper to allow one who is not a licensed attorney to appear and conduct a case, although it is doubtful if this would be sufficient to reverse the case on appeal.[3]

§ 223. Time and Order of Argument—Waiver. The order of argument at the close of the evidence is so well known as to need no comment. An attorney should avail himself of the right to argue to the jury at the proper time and it is only within the discretion of the court to allow him to argue to the jury afterwards.[4]

It may be, however, that the plaintiff desires to waive his opening argument and if the defendant should do the same the case would then be given to the jury without any argument on either side,[5] but where plaintiff waives his opening, and the defendant proceeds to argue to the jury, the plaintiff has the right to make the closing argument, although he made no argument in the first instance.[6]

§ 224. Limiting Time Consumed in the Trial. Trials were of the most summary nature up to the beginning of the eighteenth century; truth was not supposed to require more than a cursory investigation. Quick dispatch was expected and the trial was supposed to be finished before the close of the day. It was not until 1794 that the practice of adjourning the trial of the case from day to day was assumed by the court.

Gradually all this became changed until at present we are in danger of going to the other extreme and showing too little regard for the value of time. Time should not be regarded as unlimited in quantity nor on the other hand should it be re-

2—Gunn v. Gunn, 95 Ga. 439, 22 S. E. 552.

3—Newburger v. Campbell, 9 N. Y. 102; Garrison v. Wilcoxon, 11 Ga. 154; Williams v. West Bay City, 119 Mich. 395, 78 N. W. 328.

4—Harrington v. Puley, 26 Ill. 94; Reardon v. Smith, 72 Ill. App. 675; Com. v. Hull, 4 Allen (Mass.) 305; Stall v. Morris, 84 N. C. 756; Donnelly v. State, 26 N. J. L. 463; Combs v. State, 75 Ind. 215.

5—Martin v. State, 51 Ga. 567; State v. Rose, 81 Iowa 138, 46 N. W. 812.

6—Pa. Co. v. Greso, 79 Ill. App. 127; Lewandowski v. State, 70 Wis. 458, 36 N. W. 21; Preston v. Walker, 26 Iowa 207; Trask v. People, 151 Ill. 523, 38 N. E. 248.

garded of such intrinsic value that the rights of litigants are jeopardized and justice sacrificed in order to save time.

The court in a New York case said: "It is the first time we have ever heard it urged that a party who had a conceded right should not have a remedy to enforce it, because a large consumption of time would take place before his right could be established. If a party has a legal title to an office, it surely can be no legal reason for denying him the opportunity to establish it, that such process will require the examination of a large number of witnesses and consume much time in the proceeding. Rights of parties cannot be determined on such a basis."[7]

As one writer has well said: "What is necessary to be done the law allows, no matter how long a time it may take to do it. No man's defense or claim should suffer because the court thinks there is too much time wasted in investigating it."

The parties to a case have a right to have all their witnesses heard whenever a controlling fact is the matter in controversy, provided that these witnesses have knowledge bearing on the point in contest and to deny this right would be considered error sufficient to reverse the case.[8]

It is held in an action for personal injuries that the trial court has no power to limit the number of witnesses which a party may call to testify as to the occurrences at the time of the accident.[9]

The court should not indulge in facetious remarks about the consumption of time and it has been held to be improper conduct, although not sufficient in the particular case cited to warrant a reversal.[10]

In general, however, it seems to be well settled that the court may, with entire propriety, limit the evidence presented upon a certain point, and require a party calling further witnesses for examination on the same point to pay the costs of the witnesses called.[11]

§ 225. Limiting the Time Consumed in Argument. In a great many decisions the courts appear to recognize the right

7—People v. Pease, 27 N. Y. 45, 61.

8—Williams v. McKee, 98 Tenn. 139, 38 S. W. 730; Crane Co. v. Stammers, 83 Ill. App. 329.

9—Ward v. Dick, 45 Conn. 235; Cooke B. Co. v. Ryan, 98 Ill. App. 444; Reynolds v. P. J. B. Factory, 52 Hun (N. Y.) 64; Union R. Trans. v. Marr, 80 Ind. 458.

10—Chi. C. Ry. Co. v. Wall, 93 Ill. App. 411; Mergentheim v. State, 107 Ind. 567, 8 N. E. 568.

11—Long v. State, 12 Ga. 295.

of a trial court to limit the time consumed by counsel in their arguments.[12] This power must be exercised with sound discretion and the limitation imposed must be reasonable.[13] The only valid reason for limiting the time at all is a great press of business before the court, or that an unusual amount of time is consumed by a long and purposeless argument.

The limiting of time used in argument to the jury is a serious question for consideration, for it is manifestly impossible for the court to know in advance how much time may be required to present a full and fair argument upon the case. What is worth doing at all is worth doing well, and in haste there is no gain. Counsel should not be subjected to the treatment afforded race horses or pugilists on whom time is called. Their thoughts may, like the entered race horse, spring forth and run a part of the course, but fail to make the finish within the time allotted.

It has been held to be an abuse of discretion to limit the time to 5 minutes in a felony case, about 10 witnesses testifying in the case.[14] Even 30 minutes was held insufficient in a similar case.[15] So also, to limit a party to five minutes so that he is unable to make a substantial presentation of his case in argument to the jury, there being evidence on which a verdict could be sustained.[16]

If a court can limit the argument to fifteen minutes it can limit it to less, or may take the right away altogether, which in some instances amount to the same thing, and thus deprive a party of his clear constitutional right. An attorney who is sensible of his solemn duties and obligations to his client would not feel he could measure up to that standard of duty by attempting to elucidate the issues in even an ordinary case in the beggarly time sometimes allotted.

In some states no limitation is allowed to be placed on the time allotted counsel in argument.[17]

12—Smith v. Bragden, 66 Miss. 178; Hanson v. State, 18 Tex. Cr. App. 183; So. K. R. v. Michaels, 49 Kan. 388, 30 Pac. 408; Unger v. State, 62 Mass. 311; People v. Keenan, 13 Cal. 584; Pease v. Barkowsky, 67 Ill. App. 277; State v. Page, 21 Mo. 257.

13—Schneider v. N. C. St. R. Co., 80 Ill. App. 306.

14—White v. People, 90 Ill. 117.

15—Dille v. State, 34 Ohio 617.

16—Zweitusch v. Lowy, 57 Ill. App. 106.

17—See Code of Iowa, 1897; State v. Page, 21 Mo. 257, 64 Am. Dec. 220; People v. Labadie, 66 Mich. 702, 33 N. W. 806.

§ 226. **Allowing Additional Time for Argument.** To allow counsel to indulge in further argument or additional argument, as well as to permit the introduction of further evidence after the close of the case, is always a matter for the sound discretion of the court,[18] and where counsel is thus given additional time for argument, he is required to use it in order to have any standing to complain that he was not allowed a sufficient time for argument.[19]

§ 227. **Interruptions by Opponent for the Purpose of Wasting Time.** The judge should exercise such a control over the trial that the party arguing the case before the jury should have the full benefit of his opportunity to fairly present his view of the case and continual interruptions on the part of the adverse party made under pretense of objecting, should not be permitted.[20]

§ 228. **Arguments Should be Confined to the Evidence.** It is a well settled principle that the jury should receive the evidence from the witnesses sworn at the trial and not from the statements made by counsel in their arguments. It is for this reason manifestly improper for counsel to state to the jury facts which have not been proven at the trial,[21] but statements which are unsupported by the evidence should not ordinarily be considered as serious, as considerable latitude should be allowed counsel in their argument to the jury.[22]

It is upon the evidence that has gone to the jury, excepting such portions as may have been stricken out on motion by the court, that counsel have a right to comment upon in their arguments to the jury.[23] To recite facts not in evidence regarding specific acts of witnesses, or any other matters during the argument by counsel, is held sufficient to warrant reversal of the case and remanding it for a new trial. Many lawyers unfor-

18—Boreham v. Byrne, 83 Cal. 23; Gulf C. & S. F. Ry. Co. v. Matthews, 89 S. W. 983.

19—American S. Co. v. U. S., 77 Ill. App. 106.

20—N. Chi. St. R. Co. v. Cotton, 140 Ill. 486, 29 N. E. 899; Barry v. State, 10 Ga. 511; Willis v. McNeil, 57 Tex. 474.

21—Haskell v. McCoy, 38 Kas. 53; Brown v. Swineford, 44 Wis. 282; Bedford v. Penney, 58 Mich. 424; W. C. St. Ry. Co. v. Krueger, 68 Ill. App. 450.

22—Fitzgerald v. Benner, 219 Ill. 488, 76 N. E. 709; Dollar v. State (Ala. 1893), 13 So. Rep. 576.

23—Union Cent. L. I. Co. v. Cheever, 36 Ohio St. 201; Chi. & E. I. R. Co. v. Mochell, 193 Ill. 208. 61 N. E. 1028.

tunately cannot understand that a verdict which is obtained by unfair means is as good as no verdict at all.[24]

§ 229. Matters of Common Knowledge May be Referred to in Argument. Where the matter referred to by counsel in his argument is a matter of common experience and knowledge it is entirely proper, although it may not be based upon or warranted by the evidence. Well known facts may be referred to by way of illustration; the jury may be called upon by an attorney in his argument to sustain the laws, and the fact that crime has gone unpunished may be referred to where it is a matter of general notoriety.[25]

§ 230. Personal Opinions of Counsel to be Avoided. No personal opinion on the case should be indulged in by counsel, as this would be improper even in the case of a sworn witness. Nor should counsel state to the jury that the adverse party has no case; all such remarks should be avoided. Counsel should not assume the character of a witness.[26]

§ 231. Comment on the Conduct of Parties and Appearance of Witnesses. The conduct of the parties at the trial may be commented upon with entire propriety; to be libelous there must be proof presented that such statements were maliciously made, as an attorney has a constitutional privilege to make such fair comments as in his judgment seems proper.[27] So also reasonable comments may be made upon the personal appearance and manner of the witnesses upon the stand,[28] but unjustifiably indulging in coarse and vulgar abuse of witnesses and parties is improper in argument.[29]

Any proper inference from the evidence may, of course, be drawn by counsel in his argument and in a proper case counsel

24—Barth v. Krainth, 106 N. W. 803; Ry. Co. v. Krueger, *supra;* Coleman v. State, 87 Ala. 14, 6 So. 290.

25—Siebert v. People, 143 Ill. 571, 32 N. E. 431; State v. Elvins, 101 Mo. 243, 13 S. W. 937; State v. Valwel, 66 Vt. 558, 29 Atl. 1018; State v. Phillips, 117 Mo. 389, 22 S. W. 1079; Ferguson v. State, 117 Mo. 389; Ferguson v. State, 49 Ind. 33; Petty v. Com., 12 Ky. L. 919, 15 S. W. 1059.

26—Rabberman v. Pierce, 77 Ill. App. 405; State v. Beasley, 84 Iowa 83, 50 N. W. 570; Grace v. McArthur, 76 Wis. 641, 45 N. W. 518; Hatcher v. State, 18 Ga. 469; People v. Barnhart, 59 Cal. 402.

27—Atlanta News Co. v. Medlock, 123 Ga. 714, 51 S. E. 756.

28—I. C. Ry. Co. v. Beebe, 174 Ill. 13, 50 N. E. 1019, 43 L. R. A. 210; Friemark v. Rosenkrans, 81 Wis 359, 51 N. W. 557.

29—City of Salem v. Webster, 192 Ill. 376, 61 N. E. 323; Dollar v. State, 99 Ala. 236, 13 So. 576; Heyl v. State, 109 Ind. 589, 10 N. E. 916; Brow v. State, 103 Ind. 133, 2 N. E. 296.

may speak of a witness as having been bribed and perjured. In the case cited below, a witness was recalled by the adverse party and gave damaging testimony against the party first calling him, much of which was, however, contradicted by other credible evidence. The court held that counsel might draw any proper inference from the evidence they chose, and a designation of such a witness as bribed and perjured was considered proper.[30]

§ 232. Freedom of Speech Allowed in Argument. Counsel should be allowed considerable latitude in his argument,[31] and the most liberal freedom of speech consistent with fairness, justice and the orderly administration of the trial, but the rights of the parties should not be prejudiced thereby and unless prejudice clearly results therefrom the Supreme Court will not consider it as error.[32] The courts regard the question of the propriety of the argument of counsel in a case as a matter of delicacy.[33] But a judge having the power to keep counsel within due bounds should use it promptly and impartially whenever occasion demands, without having the court's attention called to it by the motion of the adverse party.[34]

That counsel must be confined in his argument to the evidence adduced on the trial does not include a limitation upon him against all flights of fancy and arts of oratory, but merely restrains him from stating as verities matters which have no foundation in the evidence nor can be logically drawn therefrom.

§ 233. Privilege of Attorney on Account of Words Used in Argument. An attorney has not an absolute, but a qualified, or conditional, privilege; he is protected by this privilege on account of words spoken by him on the trial of the case and during the discharge of his duties, unless it can be shown that he was actuated by express malice. If under the cover of his

30—E. St. L. Con. Ry. Co. v. O'Hara, 49 Ill. App. 282, aff'd, 150 Ill. 580, 37 N. E. 917; Wichita Valley Mill Co. v. Hobbs, 51 Ex. C. W. App. 34.

31—Dollar v. State, 13 S. 576; Campbell v. Kalamazoo, 80 Mich. 655; Porther v. Throop, 47 Md. 313; Walsh v. People, 88 N. Y. 438; Goldstein v. Smiley, 168 Ill. 443, 48 N. E. 203.

32—N. C. St. R. Co. v. Anderson, 176 Ill. 635, 52 N. E. 21; Gregory v. Ohio R. R. Co., 37 W. Va. 606.

33—W. C. St. Ry. Co. v. Annis, 165 Ill. 478, 46 N. E. 264; Robinson v. Adkins, 19 Ga. 398; Lamar v. State, 65 Miss. 93.

34—N. C. St. Ry. Co. v. Cotton, 140 Ill. 486, 29 N. E. 899.

profession he should seek to maliciously slander a party he is liable. No malice is implied from mere words spoken in court in the discharge of his duties on the trial, but the repetition of such words elsewhere in private or public, or by publication in the press, would render him liable the same as any other person.

§ 234. **Appeals to Prejudice or Passion.** One of our tribunals has well said: "The breath of passion through the zeal or forgetfulness of counsel must not disturb the most solemn and deliberate consideration of the jury entrusted with duties and responsibilities so important."[35]

Counsel should be restrained by the court of its own motion from indulging in appeals to sympathy or prejudice in such cases where the feelings may be easily aroused.[36] It is held that any remark made by counsel in his argument calculated to arouse passion and prejudice will warrant a reversal, especially in a close case.[37] A remark of counsel in argument was held improper which characterized a railroad crossing as a "dirty death trap."[38]

Remarks concerning the approval or disapproval of a verdict one way or the other by the public at large, in order to influence the finding of the jury, are improper and should not be permitted in argument.[39]

35—C. C. Ry. Co. v. Osborne, 105 Ill. App. 462, 469-70.

36—N. C. St. Ry. Co. v. Leonard, 67 Ill. App. 603; P. C. C. & St. L. Ry. Co. v. Story, 63 Ill. App. 239; Cooksie v. State, 26 Tex. App. 72; Kennedy v. State, 19 Tex. App. 618; State v. Proctor, 53 N. W. 424.

37—Ry. Co. v. Garner, 83 Ill. App. 126.

38—Ry. Co. v. Mahoney, 79 Ill. App. 58.

39—L. E. & W. Ry. Co. v. Middleton, 142 Ill. 550, 46 Ill. App. 218, aff'd, 32 N. E. 453; State v. Jackson, 95 Mo. 623; Scott v. State, 7 Lea (Tenn.) 252.

"Counsel, in commenting upon the testimony of a policeman, one of defendant's witnesses, stated that courts have held that the testimony of police officers, in cases in which they are prosecuting, ought to be looked upon with suspicion. The officer was not prosecuting in the case at bar and the law was not properly stated. The learned counsel for appellee was evidently carried away by his zeal, and we are unable to say that the jury were not swept along by these inflammatory and improper remarks which were calculated to incite in their minds a prejudice against the defence. Hennies v. Vogel, 87 Ill. 242; C. & E. R. R. Co. v. Binkopski, 72 Ill. App. 22; Chi. C. Ry. Co. v. Osborne, *supra.*

§ 235. References to Other Crimes of Accused. The argument in a criminal case should be kept within due bounds, and references to crimes of the accused other than those for which he is on trial, whether such crimes are real or imaginary, are improper.[40]

§ 236. Reference to Poverty and Wealth. To appeal to the prejudices of the jury in an action sounding in damages is always improper,[41] and where the remarks made are of a character likely to prejudice the jury, the verdict, if excessive, will be considered as the result of prejudice and no remittitur will cure it,[42] so it has been held that references to the plaintiff as being poor and to the defendant as being rich are improper and not cured by a remittitur,[43] and in an action for negligence the allusions of counsel to the poverty of the plaintiff are especially improper and a subsequent withdrawal does not cure the error.[44]

On the other hand, argument of counsel referring to the financial condition of the defendant and using the words "amassed a fortune" were held not a good ground for reversing the case.[45]

The court held that remarks made by counsel for plaintiff in an action on an accident policy that "no one will say that the plaintiff is a fraud, excepting the counsel for the defendant, who is hired to do so, and that counsel is trying not to do justice but to wrong a fellow citizen in the interests of his clients, because they are rich and can pay," were calculated to arouse the passions of the jury.[46]

A reference to the fact that one of the parties to the suit against a corporation is poor, is improper in the argument of counsel to the jury, as it in no wise adds to the right of the plaintiff to recover.[47]

40—Palmer v. People, 138 Ill. 356, 28 N. E. 130; Leahy v. State, 31 Neb. 566, 48 N. W. 390; Holder v. State, 58 Ark. 473, 25 S. W. 279.

41—Evans v. Trenton, 112 Mo. 390, 20 S. W. 614; Belo v. Fuller, 84 Tex. 450, 19 S. W. 616; N. C. St. Ry. Co. v. Southwick, 66 Ill. App. 241.

42—Nicholson v. O'Donald, 79 Ill. App. 195.

43—Nicholson & Sons v. O'Donald, *supra;* W. C. St. R. Co. v. Musa, 180 Ill. 130, aff. 80 Ill. App. 226, 54 N. E. 168; Taylor v. Harris, 68 Ill. App. 94; Gulf R. Co. v. Fox. (Tex.), 33 A. & E. Corp. Cases 543.

44—W. C. St. Ry. Co. v. Musa, *supra.*

45—Wolf v. Moses, 92 Ill. App. 279; Dugan v. Ch. R. Co., 85 Wis. 609, 55 N. W. 894.

46—C. & E. I. R. Co. v. Garner, 83 Ill. App. 118.

47—N. C. St. Ry. Co. v. Southwick, 165 Ill. 494, aff. 66 Ill. App. 243, 46 N. E. 377.

§ 237. **Reference to Inability to Secure a Witness on Account of Expense.** A remark of counsel that his client was not able to call a physician who attended him as a witness for the reason that the physician asked $100.00 for testifying, is improper. The court by subpœna and other process could compel the witness to attend and testify in the case.[48]

§ 238. **Comments on Withholding Evidence.** The fact that one of the parties withholds certain evidence within his control is held a proper matter for comment, but this in no wise warrants a statement in detail of what such evidence might be.[49] That a witness is not produced by a party when such witness is a person presumed to have a special knowledge of the matters in controversy is held a legitimate matter of comment.

To refer to the failure of the opponent to testify in civil cases is not improper, but for the state's attorney to refer to the failure of the defendant to testify is held error sufficient to require a reversal in nearly all jurisdictions.[50]

To say to the jury that the other party had excused a juror for the reason that he knew one of the parties is improper to be stated in argument.[51]

§ 239. **Referring to the Corporate Capacity of Opponent.** In a personal injury case counsel in his argument remarked that the defendant corporation was an artificial being and did not have human feelings and sympathy. The court held this reversible error and stated that a corporation in law, so far as damages are concerned, must stand the same as any other person.[52] So also it was not proper for counsel to state that the enactment of a statute involved in the case was procured by efforts of corporations where the defendant in the case on trial was a corporation.[53]

48—American M. Co. v. Lelivelt, 101 Ill. App. 320.

49—St. L. Con. Coal Co. v. Scheiber, 167 Ill. 539, 47 N. E. 1052.

50—Gilmore v. P., 87 Ill. App. 137; A. & S. R. Co. v. Randal, 85 Ga. 297, 11 S. E. 806; Bennett v. State, 86 Ga. 405, 12 S. E. 806; 22 Am. St. Rep. 415; State v. Helm, 92 Iowa 540, 61 N. W. 246; Berry v. State, 10 Ga. 326; Bullard v. Boston, 64 N. E. 27, 10 Am. St. Rep. 367.

51—O. & M. Ry. Co. v. Wangelin, 152 Ill. 138, 38 N. E. 760.

52—Whipple v. M. C. Ry., 143 Mich. 41, 43, 106 N. W. 690.

53—Elgin City Ry. Co. v. Wilson, 56 Ill. App. 364; Radford v. Lyon, 65 Tex. 477; Retan v. L. S., etc., R. Co., 94 Mich. 155, 53 N. W. 1094; Cleveland, etc., R. Co. v. Williams, 102 Mich. 537, 61 N. W. 52; Lake Erie, etc., R. Co. v. Cloes, 5 Ind. App. 444, 32 N. E. 588.

§ 240. Profane and Obscene Language. The control of the trial court over the closing argument extends not only to confining counsel to the evidence introduced and restraining prejudicial appeals to sympathy or passion, but also to preventing profanity, obscenity and all other improper and intemperate language.[54]

Ordinary infractions of this rule do not usually partake of so serious an error as to demand a reversal. When counsel turned to one of the witnesses during argument and called him a "liar" the court did not consider this a sufficient ground for a reversal, although offensive and unprofessional.[55]

§ 241. Improper Remarks Cured by Rebuke of Court. Usually the improper remarks made in argument of counsel to the jury may be cured upon objection thereto by the remarks of the court in restraining counsel from indulging in such a line of argument and in cautioning the jury to disregard the same, or, on the other hand, it may be effectively removed by a withdrawal of the remarks by the offending counsel. All of this is no doubt true ordinarily, but there are instances where the effect has been produced upon the jury and remains with them and counsel may not violate the proper rules which they should observe in the argument and escape so easily from the consequences and reap the reward of their iniquity.[56]

The trial judge has the duty of supervising the arguments of counsel and this he may do at the request of the opposite party or upon his own motion restraining all remarks or lines of argument that are unfair and improper.[57] Such remarks as that the defendant is a corporation and the plaintiff is a poor man are improper and when not made willfully or in disregard of

54—Doster v. Brown, 25 Ga. 24, 71 Am. Dec. 153; U. S. v. Heath, 20 S. C. 272; Amperse v. Flickenstein, 67 Mich. 47, 34 N. W. 564; State v. Thornton, 108 Mo. 640, 18 S. W. 841; Cartier v. Troy Lumber Co., 35 Ill. App. 449.

55—Strickland Wine Co. v. Hayes, 94 Ill. App. 479; Dale v. State, 88 Ga. 552, 15 S. E. 287.

56—Kedzie v. State, — Miss. —, 16 So. 490; Wetzel v. Meranger, 85 Ill. App. 457; People v. Hess, 85 Mich. 128, 48 N. W. 181; Long v. State, 56 Ind. 182; Hunt v. State, 28 Tex. App. 149, 21 S. W. 723.

57—W. C. St. Ry. Co. v. Sullivan, 165 Ill. 302, 46 N. E. 234; W. C. St. Ry. Co. v. Krueger, 68 Ill. App. 450; C. & E. Ry. Co. v. Binkopski, 72 Ill. App. 22; State v. Hamilton, 55 Mo. 522; McConnell v. State, 22 Tex. App. 354, 3 S. W. 699; Chacon v. Territory, 7 N. M. 241, 34 Pac. 448.

the admonition of the court may be properly cured by the remarks made by the court in restraining counsel.[58]

Remarks that have no foundation in the evidence and have a tendency to be prejudicial in their effect are improper and it is competent for the court by a sharp rebuke of counsel to remove such improper effects so far as it can be done by stating to the jury that there is no evidence to warrant such argument in that regard.[59]

The trial judge should immediately suppress any conduct or improper language used by counsel in his argument, and it is held that such acts are not prejudicial where the trial court attempts to suppress it and sustains the objections thereto, although it is reprehensible conduct on the part of the offending counsel.[60]

Where the court admonishes the jury not to be influenced by the improper remarks of counsel whenever made, and reprimands counsel for the same, it has been held not to constitute error.[61] Counsel should be rebuked for an improper remark to the jury during argument in such a manner that he may not derive any benefit from the remark made.[62]

§ 242. Improper Remarks Not Cured by Withdrawal. When an objection has been made and counsel cautioned or reprimanded for making improper remarks, it does not cure the effect that these remarks have produced upon the jury to have counsel withdraw them. All the proper rules which counsel should have observed in argument to the jury cannot be violated with impunity and the consequences avoided by means of the mere oral statment that he withdraws the remarks.[63] Such withdrawal is held insufficient to amend the error committed.[64]

58—Bettes v. C. R. I. & P. Ry., 108 N. W. 103; Schlotter v. State, 127 Ind. 493, 27 N. E. 149.

59—Brzozowski v. National Box Co., 104 Ill. App. 338; Forsyth v. Cochran, 61 Ga. 278; Willis v. McNeil, 57 Tex. 474.

60—W. C. St. Ry. Co. v. Levy, 182 Ill. 527, 55 N. E. 554; Berry v. State, 10 Ga. 511; Fry v. Bennett, 14 N. Y. Sup'r Ct. 242; Kellin v. State, 28 Fla. 313, 9 So. 711.

61—Gundlach v. Schott, 192 Ill. 509, 61 N. E. 332, 55 L. R. A. 240; Matson v. State, 22 S. W. 1038; Fritzeller v. State, 30 Tex. App. 42, 16 S. W. 751; State v. Foley, 12 Mo. App. 43.

62—Pease v. Barkowski, 67 Ill. App. 274; C. & E. R. Co. v. Binkopski, *supra;* Henry v. Huff, 143 Pa. St. 563, 22 Atl. 1046; Waterman v. Chi. R. Co., 82 Wis. 613, 52 N. W. 247.

63—Met. R. Co. v. Johnson, 90 Ga. 500, 16 S. E. 49; Met. R. Co. v. Powell, 89 Ga. 61, 16 S. E. 118; Cook v. Doud, 14 Colo. 483, 23 Pac. 906; Wetzel v. Meranger, 85 Ill. App. 457.

64—I. C. R. Co. v. Souders, 178 Ill. 585, 53 N. E. 408; Hill v.

§ 243. Improper Remarks Cured by an Instruction. The following instruction was given and approved by the Supreme Court of Indiana: "Gentlemen of the jury, counsel have no right to refer to anything outside of the case, and you must not consider anything except such things as have reference to the case on trial, and counsel must not go outside the records in this case any more."[65]

§ 244. Objections to Improper Remarks Should be Made Immediately. The argument of counsel, when improper, should be objected to and ruling obtained upon the objection at the time the impropriety takes place. There is a practice of permitting the argument to proceed uninterruptedly, and subsequently to except to the improper portion, but this practice is not approved.[66] Although this practice may be for the purpose of obviating the necessity of interruption, it is not proper. Objections which may be made to the argument of counsel should be passed upon by the court at once and in the presence of the jury.[67]

§ 245. Reference to Damages in Previous Trial or to Amount of Verdicts in Other Cases. To state to the jury the amount awarded as damages in a previous trial in another court is improper in argument,[68] and in fact any reference to the amount

State, 42 Neb. 503, 60 N. W. 916; Rudolph v. Landorlen, 92 Ind. 40; Reed v. Madison, 85 Wis. 667, 56 N. W. 182.

65—Smith v. State, 165 Ind. 188, 74 N. E. 985.

See also Gillett's Criminal Law, 901; Norton v. State, 106 Ind. 163, 169, 6 N. E. 126; Blume v. State, 154 Ind. 343, 354-357, 56 N. E. 771 and cases cited; Epps v. State, 102 Ind. 539, 550-552, 1 N. E. 491; Carter v. Carter, 101 Ind. 450; Anderson v. State, 104 Ind. 467, 475, 4 N. E. 63; 5 N. E. 771; Shular v. State, 105 Ind. 289 (306), 4 N. E. 870, 55 Am. Rep. 211; Boyle v. State, 105 Ind. 469, 480, 481, 5 N. E. 203, 55 Am. Rep. 218; Warner v. State, 114 Ind. 137, 140, 141, 16 N. E. 189; Proctor v. DeCamp, 63 Ind. 559, 561; Amperse v. Fleckenstein, 67 Mich. 247, 34 N. W. 564; Fry v. Bennett, 3 Bos. (N. Y.) 243, aff'g, 28 N. Y. 324; State v. Oneal, 7 Ired. (N. C.) 251; Doster v. Brown, 25 Ga. 24, 71 Am. Dec. 153; U. S. v. Heath, 20 D. C. 272.

66—Morrison v. State, 76 Ind. 344; Western U. Tel. C. v. Wingate, 6 Tex. Civ. App. 394, 25 S. W. 439; Penn. Co. v. Greso, 79 Ill. App. 134.

67—Penn. Co. v. Greso, *supra;* Metropolitan St. R. Co. v. Johnson, 90 Ga. 500, 16 S. E. 49; Davis v. State, 33 Ga. 98; Lynch v. Peabody, 137 Mass. 92; King v. State, 91 Tenn. 617, 20 S. W. 169; Hencke v. Milwaukee City R. Co., 69 Wis. 401, 34 N. W. 243.

68—Huskhold v. St. L. R. R. Co., 90 Mo. 548, 2 S. W. 794; Smiley

of verdicts in other cases which have been sustained by the courts is improper.[69] To state in the argument as follows: "I do not want any compromise verdict in this case. This case has been to the Appellate Court and was reversed for the sole reason that the jury did not give us damages enough," is justly held to be improper.[70]

§ 246. When the Opposite Party is Equally Guilty—Condoned. The Supreme Court of Illinois has ruled that all conduct of counsel, no matter how improper, is condoned where the opposite party is equally guilty of a similar offense.[71]

v. Scott, 77 Ill. App. 555, aff. 179 Ill. 142, 53 N. E. 544.

69—Quincy Gas & E. Co. v. Bauman, 104 Ill. App. 600; Huskhold v. St. L. R. R. Co., *supra*.

70—C. N. W. R. Co. v. Smedley, 65 Ill. App. 649; State v. Emery, 79 Mo. 401; Chacon v. Territory, 7 N. M. 241, 34 Pac. 448.

71—Maxwell v. Durkin, 185 Ill. 547, 56 N. E. 1101.

CHAPTER XIII.

MOTION TO DIRECT A VERDICT.

§ 247. **Introductory.** Under the old common law practice the directing of a verdict by the court was not so much of a fiction as it is today. Jurors were then used as dummies, but this was later on remedied by statute providing for the directing of a verdict by the court without participation of the jury. It is interesting to consider the extent of power a jury may have had to disobey the order of court to direct a verdict under the old common law form of practice. Jurors certainly have attempted to disobey this order and that without fear that such conduct would be punishable criminally.[1]

1—See account of the trial of How. (U. S.) 362; Cosgrove v. N. Zenger, 1734; Parks v. Ross, 11 Y. R. R. Co., 2 N. Y. 492.

§ 248. Directing a Verdict; Under What Circumstances. The jury are the judges of the evidence, but where there is no conflict in the evidence it becomes a matter of law whether judgment should be rendered for or against a party.[2] In such cases the court is limited strictly to the determination whether there is any evidence upon which a verdict could be rendered.[3] If there is evidence tending to show the plaintiff's right to recover, there must be a submission of the case to the jury.[4]

All disputed questions of fact must be left to the jury, and where the evidence must be weighed the trial court should not sustain a motion to direct a verdict.[5] It is only in cases where the testimony given is of such a character that the court, in the exercise of sound discretion, would be compelled to set aside a verdict, if rendered thereon, that a motion to direct a verdict should be sustained by the court.[6]

In doubtful cases it is the better practice to allow such a case to go to the jury and to set aside the verdict afterwards upon motion for a new trial if the court is satisfied that it is manifestly not supported by the weight of the evidence.[7]

2—Star Wagon Co. v. Matthiesen, 3 Dak. 223, 14 N. W. 107; Lacey v. Porter, 103 Cal. 597; Chi. Gen. Ry. Co. v. Novaeck, 94 Ill. App. 178.

In O'Donnell v. MacVeagh, 205 Ill. 23, 25, 68 N. E. 646, the court instructed the jury: "This question is one of the law—and is—was there evidence adduced before the jury which, with all legitimate and natural inferences to be drawn therefrom, fairly tended to support the cause stated in the declaration, or any count thereof."

The court held it would have been proper to have given a peremptory instruction. See also Ill. S. Co. v. Coffey, 205 Ill. 206, 212, 68 N. E. 751; Freeman v. Scarlock, 27 Ala. 407.

3—Wetherell v. Chi. C. R. Co., 104 Ill. App. 357; Tyson v. Tyson, 37 Md. 567; Grand Trunk R. v. Nicol, 18 Mich. 126.

4—Landgraf v. Kuh, 188 Ill. 484, 492, rev. 90 Ill. App. 134, 59 N. E. 501; Payne v. Mathius, 92 Ala. 585, 9 So. 605; Stevens v. Pendleton, 85 Mich. 137, 48 N. W. 478; C. C. C. & St. L. Ry. Co. v. Baddeley, 150 Ill. 328, 36 N. E. 965.

"If there is evidence which fairly tends to support the plaintiff's case, it must be submitted to the jury." Pullman Palace Car Co. v. Laack, 143 Ill. 242, 32 N. E. 285; Heyne v. Blair, 62 N. Y. 19.

5—Rush v. Coal Bluff M. Co., 131 Ind. 135, 30 N. E. 904; McKechney v. Columbian Powder Co., 86 Ill. App. 27; I. C. R. Co. v. Kelley, 10 U. S. App. 537.

6—Haecker v. Chicago & A. R. Co., 91 Ill. App. 570; Purcell v. English, 86 Ind. 34; Gilman v. Sioux City R. Co., 62 Ia. 299, 17 N. W. 520.

7—Wallen v. N. C. St. Ry. Co., 82 Ill. App. 103; Avary v. Perry Store Co., 96 Ala. 406, 11 So. 417.

Where under all the evidence in the case a verdict for the plaintiff would not be permitted to stand, the jury should be instructed to find for the defendant,[8] and in passing on a motion to instruct the jury to find for the defendant the court is limited to the determination of the question whether or not there is evidence which, if true, would reasonably tend to support the plaintiff's case.[9]

A motion to direct a verdict does not involve a determination of the credibility of witnesses or the weight of the evidence.[10] It is only in cases where there is literally no evidence to support a necessary allegation or where the evidence is too weak and inconclusive to justify a verdict, that the court should direct a verdict when a motion is properly made.[11] In those cases where there is no evidence tending to prove the defense or controverting the facts which entitle the plaintiff to a recovery, the jury should then be directed to find the issues for the plaintiff.[12]

The courts hold that where there is no evidence before the jury in favor of the party holding the affirmative on which the jury could find in his favor, the court should direct a verdict in favor of the opposing side,[13] but if there is any evidence or testimony which with all of the inferences proper to be drawn from it, tends in any way to prove the issues stated, the court should not direct a verdict against such a party.[14]

If there is no evidence in the case sufficient to support a verdict against a party the court should be asked to direct a verdict in his favor, and an omission to do this would be in the nature of an admission that there is evidence upon which the jury might base a contrary opinion.[15] A party who has not asked for the directing of a verdict thereby waives his right to have the verdict set aside on the ground that there is no evidence sufficient to support it, but this does not preclude

8—Bjork v. I. C. R. C., 85 Ill. App. 269.

9—O'Donnell v. L. S. & M. S. Ry. Co., 100 Ill. App. 424; Sniter v. Park Nat'l Bank, 35 Neb. 372, 53 N. W. 205.

10—Brezinski v. Swift & Co., 91 Ill. App. 537; Schultze v. Mo. Pac. R. R. Co., 32 Mo. App. 435.

11—Offutt v. World's Col. Exp. Co., 175 Ill. 472, 51 N. E. 651; Fritz v. Clark, 80 Ind. 591.

12—Marshall v. John Grosse Clothing Co., 184 Ill. 421, 83 Ill. App. 338, 56 N. E. 807.

13—Mattson v. Qualey Const. Co., 90 Ill. App. 260.

14—Lange v. Seiter, 81 Ill. App. 192.

15—Haist v. Bell, 48 N. Y. 405.

him from having the verdict set aside as being against the weight of the evidence.

The courts hold to the general rule that if the testimony offered on behalf of the plaintiff makes a prima facie case and the evidence offered by defendant is insufficient to support a defense, the court may properly direct a verdict for the plaintiff.[16]

§ 249. Nature of a Motion to Direct a Verdict. A motion to take a case from the jury is in the nature of a demurrer to the evidence and the truth of such evidence is admitted thereby and not only so, but it admits all the inferences which can be reasonably drawn therefrom.[17] The direction of the court to

16—West Side Auction House Co. v. Conn. Mut. Ins. Co., 186 Ill. 156, aff. 85 Ill. App. 497, 57 N. E. 839.

17—Sims v. Sims, 2 Ala. 117; Hill v. Rucker, 14 Ark. 706; Kane v. Cicero & P. E. R. Co., 100 Ill. App. 181; Hober v. W. P. Nelson Co., 101 Ill. App. 336; Purcell v. English, 86 Ind. 134; Fox v. Spring Lake Iron Co., 89 Mich. 387, 50 N. W. 872.

In I. C. R. R. Co. v. Harris, 184 Ill. 57, 58, affg. 84 Ill. App. 462, 56 N. E. 316, 48 L. R. A. 175, the court held that:

"In requesting the court to instruct the jury to find for the defendant, the truth of plaintiff's evidence and all the inferences to be properly drawn therefrom, were admitted, and in passing upon an application to take a case from the jury, we do not consider or pass upon the weight of the evidence."

"In such cases," said the court, "the real question is whether the evidence, with all the inferences to be properly drawn therefrom, fairly tended to prove the plaintiff's cause of action as set out in his declaration. If it does, then it is the duty of the court to refuse to take the case from the jury. Offutt v. World's Col. Ex., 175 Ill. 472, 51 N. E. 651."

The following quotation is taken from the opinion in the case of Offutt v. Columbian Exposition, *supra*, in reversing 73 Ill. App. 231.

"An instruction to find against the party upon whom rests the burden of proof, on the ground that there is no evidence legally tending to prove his case, or, as it is now more generally stated, on the ground that the evidence, with all the inferences which the jury could justifiably draw from it, is so insufficient to support a verdict for such party that such verdict, if returned, must for that reason be set aside, is in the nature of a demurrer to the evidence, and, except as to technical methods of procedure, is governed by the same rules. The maker of the motion to so instruct admits the truth of all opposing evidence, and all inferences which may be fairly and rationally drawn from it. The motion does not involve a determination of the weight of the

find a verdict for one party is in effect a peremptory instruction to the jury that there are no facts for their consideration and that there exists only a question of law for the determination of the court.

evidence, nor the credibility of the witnesses. (Bartelott v. International Bank, 119 Ill. 259, 9 N. E. 898 and cases cited; Phillips v. Dickerson, 85 *id.* 11, 28 Am. Rep. 607; C. & N. W. Ry. Co. v. Dunleavy, 129 *id.* 132, 22 N. E. 15.) It has been said in some cases that, if there is any evidence, however slight, tending to prove the plaintiff's cause of action, such an instruction would be erroneous, as it is the province of the jury and not of the court to pass upon the weight of the evidence or its sufficiency in probative force, to authorize a verdict. In Simmons v. Chicago & Tomah R. R. Co., 110 Ill. 340, in delivering the opinion of the court, Mr. Justice Sheldon said (p. 346): 'There may be decisions to be found which hold that if there is any evidence—even a scintilla—tending to support the plaintiff's case, it must be submitted to the jury. But we have a more reasonable rule which has now come to be established by the better authority, that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is so insufficient to support a verdict for the plaintiff that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant.' (Pleasants v. Fant, 22 Wall. 120; Randall v. Baltimore & Ohio R. R. Co., 109 U. S. 478; Metropolitan Ry. Co. v. Jackson, 3 App. Cas. 193; Reed v. Inhabitants of Deerfield, 8 Allen 524; Skellenger v. C. & N. W. Ry. Co., 61 Iowa 714; Martin v. Chambers, 84 Ill. 579; Phillips v. Dickerson, 85 *id.* 11, 28 Am. Rep. 607.) In the recent case of Frazer v. Howe, 106 Ill. 563, this court recognized the rule to be 'if there is no evidence before the jury on a material issue in favor of a party holding the affirmative of that issue on which the jury could, in the eye of the law, reasonably find in his favor, the court may exclude the evidence or direct the jury to find against the party so holding the affirmative.' This language was quoted in Bartelott v. International Bank, *supra*, and Mr. Justice Schofield, in speaking for the court, said (p. 272): 'Since it was not intended in this case to overrule Simmons v. Chicago & Tomah R. R. Co., *supra*, it is apparent that 'evidence tending to prove' means more than a mere scintilla of evidence, but evidence upon which the jury could, without acting unreasonably in the eye of the law, decide in favor of the plaintiff or party producing it. It is not intended by this practice that the function of the jury to pass upon the questions of fact is to be invaded, any more than it is intended that such function is to be invaded by a motion to set aside a verdict or for a new trial upon the ground of the want of evidence to sustain the verdict.

For this reason it was held not to be error to refuse to allow the jury to be polled; the object of polling a jury is to ascertain whether any juror has been coerced into agreeing upon a verdict. The directing of a verdict by the court cannot be considered as coercion and the polling would be unnecessary and futile.[18]

§ 250. **Where the Evidence is Conflicting.** If the evidence is conflicting the court should refuse to direct a verdict,[19] but where there is a mere scintilla of evidence in favor of the plaintiff not amounting to a material conflict, the court may disregard such a mere trifle, or scintilla of evidence, and direct a verdict for the defendant.[20] Where reasonable minds acting under the proper rules of law might come to different conclu-

In neither case is the court authorized to weigh the evidence and decide where the preponderance is.' See also Siddall v. Jensen, 168 Ill. 43, 48 N. E. 191, 39 L. R. A. 112, and Rack v. C. C. Ry. Co., 173 *id.* 289, 50 N. E. 668, 44 L. R. A. 127. It is clear from the cases cited and others, that what is called 'the scintilla rule of evidence' is not in force in this state."

In Boyce v. Tallerman, 183 Ill. 115, 119, affg. 83 Ill. App. 575, 55 N. E. 703, quoting C. & N. W. R. Co. v. Dunleavy, *supra*, the court said: "A prayer for an instruction of this court is in the nature of a demurrer to the evidence, and is equivalent to an admission upon the record of every fact and every conclusion in favor of the opposite party which the evidence conduces to prove—in other words, every fact which the jury might have inferred from it in favor of such opposite party. Such instruction should not, therefore, be given except where there is a substantial failure of evidence tending to prove the plaintiff's cause of action or to prove some material fact necessary to establish it. The instruction asked was based upon the theory that there was a substantial failure of evidence tending to prove the negligence charged against the defendant. In considering the purport of such instruction, we have nothing to do with any question as to the preponderance of the evidence or the credibility of the witnesses, or the force to be given to the evidence having a tendency merely to impeach their veracity. The only question is, whether any evidence was given which, if true, would have tended to support a verdict for the plaintiff." Marshall v. Darney, 1 S. Dak. 350, 47 N. W. 290.

18—Ritchie v. Arnold, 79 Ill. App. 406; Williams v. McMichael, 64 Ga. 445; Baker v. State, 31 Okl. 314.

19—Smith v. Marx, 93 Ala. 311, 9 So. 194; Eaton v. Carruth, 11 Neb. 231, 9 S. W. 58; Central Ry. Co. v. Mehlenbeck, 103 Ill. App. 17; Starkweather v. Maginnis, 196 Ill. 274, 63 N. E. 692.

20—Finley v. W. Chicago St. Ry. Co., 90 Ill. App. 368; Stow v. Brosius, 39 Mo. 535.

sions and the evidence is sufficient to support a verdict it must be left to the jury.[21]

§ 251. Where the Evidence is Without Conflict. Where the evidence in behalf of both parties is without conflict and the allegations of both sides are uncontroverted, issues of law,

21—McFadden v. Sollitt, 94 Ill. App. 271; Wallen v. N. Chicago St. Ry. Co., 82 Ill. App. 103; Whalen v. Utica Hydraulic Cement Co., 103 Ill. App. 149.

[Note:

In Place v. N. Y. C. & H. R. R. Co., 167 N. Y. App. 345, 60 N. E. 632, this question was discussed at length and it is thought important enough to set out the following extract from that case:

"Conflicting evidence, bearing upon all of these questions, was given by many witnesses who were interested, and by others who were not. The result of the trial clearly depended upon the weight which might be given by the jury to the evidence presented on behalf of the respective parties.

"The plaintiff in attacking the judgment dismissing her complaint is entitled to the most favorable inferences deducible from the evidence, and all disputed facts are to be treated as established in her favor." Ladd v. Insurance Co., 147 N. Y. 478, 482, 42 N. E. 197; Higgins v. Eagleton, 155 N. Y. 466, 50 N. E. 287; Ten Eyck v. Whitbeck, 156 N. Y. 341, 349, 50 N. E. 963; Bank v. Weston, 159 N. Y. 201, 208, 54 N. E. 40; McDonald v. Railway Co., 167 N. Y. 66, 60 N. E. 282.

"The defendant, in its effort to sustain the judgment, is confronted by the rule so frequently laid down in this court, that we have nothing to do with the weight of evidence; that, if a question of fact is fairly presented, it should have been submitted to the jury. In a very recent case (McDonald v. Railway Co., 167 N. Y. 66, 60 N. E. 282), the court reviewed the authorities and approved the rule laid down in Colt v. Railroad Co., 49 N. Y. 671, as follows: 'It is not enough to justify a nonsuit that a court, on a case made, might, in the exercise of its discretion, grant a new trial. It is only where there is no evidence in law which, if believed, will sustain a verdict that the court is called upon to nonsuit; and the evidence may be sufficient in law to sustain a verdict, although so greatly against the apparent weight of evidence as to justify the granting of a new trial.' In Bagley v. Bowe, 105 N. Y. 171, 179, 11 N. E. 386, the rule is thus stated by Judge Andrews: 'The trial court or the general term is authorized to set aside a verdict, and direct the issue to be retried before another jury, if in its judgment the verdict is against the weight or preponderance of evidence; but, in a case which of right is triable by jury, the court cannot take from that tribunal the ultimate decision of the fact, unless the fact is either uncontradicted, or the contradiction is illusory, or where, to use a current word, the answering evidence is a scintilla merely.'"

and not of facts, arise and must be decided by the court.[22] When there is no conflict in the evidence, the court may direct the verdict or order a nonsuit.[23]

§ 252. Exclusion of Evidence Same as Directing a Verdict. Excluding the evidence amounts to the same thing as instructing the jury to find for the opposing party, as either course produces the same result.[24]

§ 253. All the Evidence Must Be Excluded When One Essential Allegation is Not Proved. Where there is any one essential allegation of a declaration which has no proof tending to support it, it is the duty of the court to exclude from the consideration of the jury all the evidence in the case, or to charge the jury that there is no evidence to support such essential allegation, and, for want of such proof, to find for the defendant. Whether there is any evidence tending to prove any material allegation of a declaration is a question of law for the court to determine.[25]

§ 254. No Questions of Preponderance of Evidence or Credibility Considered on a Motion to Direct. In considering the propriety of a motion to direct a verdict, the Court has nothing to do with any question as to the preponderance of the evidence or the credibility of the witnesses, or the force to be given to the evidence having a tendency merely to impeach the veracity of the witnesses. The only question is whether any evidence was given which, if true, would have tended to support a verdict for plaintiff.[26]

22—Parker v. State, 34 Ga. 262; Sims v. State, 43 Ala. 33; Ferguson v. Tucker, 2 Har. & G. (Md.) 182; Polish R. C. U. v. Warczak, 82 Ill. App. 351.

23—Greening v. Bishop, 39 Wis. 552; Johnson v. Moss, 45 Cal. 515; Kelly v. Hendricks, 26 Mich. 256; Am. Ins. Co. v. Butler, 70 Ind. 1.

24—House v. Wilder, 47 Ill. 510; Louisville R. Co. v. Woodson, 134 U. S. 614; Schwarzbach v. Ohio Valley P. Union, 25 W. Va. 622.

25—Poleman v. Johnson, 84 Ill. 269; Sims v. Sims, 2 Ala. 117; Bryan v. Ware, 20 Ala. 687; Hill v. Ruker, 14 Ark. 706.

26—Rack v. C. C. Ry. Co., 173 Ill. 289, 290, aff'g 69 Ill. App. 656, 50 N. E. 668, 44 L. R. A. 127.

In Chicago & N. W. Ry. Co. v. Dunleavy, 129 Ill. 132, 22 N. E. 15, it was said: "In Simmons v. Chi. & Tomah R. R. Co., 110 Ill. 340, this court used the following language (p. 346): 'We think the more reasonable rule, which has now come to be established by the better authority is, that when the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is so insufficient to support a verdict for the plaintiff that such a verdict, if returned, must be set aside, the court

It is not the province of the court to decide upon the sufficiency of the testimony pertaining to the facts in the case,[27] nor to order the jury upon the facts to find for either party.[28]

§ 255. Motion to Direct Should Not Be One of a Series But Separate. It has been frequently held that when the peremptory instruction asked is one of a series of instructions to the jury it does not present a question which will authorize a court of appeals to consider the facts.[29]

§ 256. Duty to Direct a Verdict Whenever the Verdict Would Afterwards Have to Be Set Aside. It is only when the plaintiff fails to make a case, so that it would be the duty of the trial court, or of a higher court on appeal, to set aside the verdict as not being supported by any competent evidence on some material point, that a verdict for the defendant should be directed.[30]

Where there is a mere scintilla of evidence to establish a fact and the evidence is so overwhelmingly against it that the court would set aside the finding of a jury, if based upon such fact then the question of the existence of such fact need not be submitted to the jury.[31]

is not bound to submit the case to the jury, but may direct a verdict for the defendant.' Pleasants v. Fant, 22 Wall. 120; Randall v. Baltimore & Ohio R. R. Co., 109 U. S. 478; Martin v. Chambers, 84 Ill. 579. The case of Simmons v. Chi. & Tomah R. R. Co., *supra*, was referred to with approval by this court in L. S. & M. S. R. R. Co. v. O'Connor, 115 Ill. 254, 3 N. E. 501, and again in Bartelott v. National Bank, 119 *id.* 259, 9 N. E. 898."

27—In House v. Wilder, 47 Ill. 510, the court said: "It is the settled practice never to instruct the jury as to the weight of evidence. When conflicting, or tending to prove the issue, however slightly, it must be left to the consideration of the jury. But when it essentially varies from the pleadings and fails to sustain the issue, the court may, and should when asked, exclude it from the consideration of the jury. Excluding the evidence amounts to the same thing as instructing the jury to find for the defendant, as either course produces the same result."

28—Oleson v. Hendrickson, 12 Iowa 222; Robinson v. Ill. C. R. R. Co., 30 Iowa 401.

29—Hartford Deposit Co. v. Sollitt, 172 Ill. 222, 224, aff'g 70 Ill. App. 166, 50 N. E. 178.

30—Diezi v. G. H. Hammond Co., 156 Ind. 583, 60 N. E. 353, 355; Gregory v. Railroad Co., 112 Ind. 385, 388, 14 N. E. 228; Wolfe v. McMillan, 117 Ind. 587, 20 N. E. 509.

31—Hogan v. Cushing, 49 Wis. 169, 5 N. W. 490; Com. of Marion Co. v. Clark, 94 U. S. 278; May v. I. C. R. Co., 35 Iowa 585; State v. Brown, 47 Ohio 102, 23 N. E. 747.

§ 257. All the Most Favorable Inferences Deducible From the Evidence are to Be Allowed on a Motion to Direct. The court having directed a verdict, the appellant is entitled to the most favorable inferences deducible from the evidence, and all disputed facts are to be treated as established in his favor.[32]

§ 258. Sufficiency of the Evidence With All the Inferences to Be Considered. When a motion to instruct the jury to return a verdict for the defendant is made at the close of all the evidence in the case, and allowed by the court, it must be that the evidence, both for plaintiff and defendant, with all the inferences which the jury might justifiably draw therefrom, is not sufficient to support a verdict for the plaintiff, if one should be returned.[33]

It now seems to be the well-settled rule that where the evidence with all the inferences properly to be drawn therefrom tends to establish the plaintiff's cause of action as set forth in the declaration, the court should decline to take the case from the jury either at the close of the plaintiff's evidence or at the close of all the evidence. In determining the propriety of a peremptory instruction of this character, the court is not authorized, nor required, to weigh the evidence or to determine where the preponderance of evidence lies.[34]

§ 259. Motion to Direct May be Waived. A motion made by the defendant at the close of the plaintiff's evidence to direct a verdict for him is waived by a failure to renew it, if denied, either by a motion or an instruction at the close of all the evidence.[35] Where both parties move for a verdict the only question then is one of law,[36] and the court may draw

32—McDonald v. Met. St. Ry. Co., 167 N. Y. 66, 60 N. E. 282, 283; Ladd v. Insurance Co., 147 N. Y. 478, 482, 42 N. E. 197; Higgins v. Eagleton, 155 N. Y. 466, 50 N. E. 287; Ten Eyck v. Whitbeck, 156 N. Y. 341, 349, 50 N. E. 963; Bank v. Weston, 159 N. Y. 201, 208, 54 N. E. 40.

33—Foster v. Wadsworth, 168 Ill. 517, 48 N. E. 160; McGregor v. Reid, 178 Ill. 471, 53 N. E. 323, 69 Am. St. Rep. 332; Birch v. Charleston L. H. & P. Co., 113 Ill. App. 229, 235-6.

34—Nicholls v. Colwell, 113 Ill. App. 219, 223-4; Siddall v. Jenson, 168 Ill. 43, 48 N. E. 191; Rack v. C. C. Ry. Co., 173 Ill. 289, 50 N. E. 668; Offutt v. Col. Exp., 175 Ill. 473, 51 N. E. 651; Landgraf v. Kuh, 188 Ill. 484, 59 N. E. 501; C. & E. I. R. R. Co. v. Filler, 195 Ill. 9, 62 N. E. 919; C. T. T. R. R. Co. v. Schmelling, 197 Ill. 619, 64 N. E. 714.

35—Humiston, K. & Co. v. Wheeler, 175 Ill. 514, 51 N. E. 893, aff'g 70 Ill. App. 349.

36—McComb v. Barkerville, — S. D. —, 106 N. W. 300.

any inference from the facts that the jury might have drawn.[37] Both parties having admitted the facts to be undisputed by their motion for a verdict, virtually agree thereby to submit questions of both law and fact to the court.

Where at the close of the evidence for the plaintiff the defendant moves the court to instruct the jury to find the issues for the defendant, and the motion was denied, and the defendant then proceeded to offer evidence, and the motion is not renewed or an instruction asked at the close of all the evidence, the motion was waived. The question of the sufficiency of the evidence to sustain a verdict was not raised as a question of law, and the court on appeal is precluded from considering questions of fact.[38]

§ 260. When the Motion to Direct Comes Too Late. It is held that a peremptory instruction must be asked at the close of the opponent's evidence, or at least at the close of all the evidence and not after the final submission of the case to the jury.[39] A request for a peremptory instruction made by the defendant is too late when made after the close of all the testimony where the defendant has requested several other instructions and the plaintiff has done the same.[40]

The judge has the right to recall all instructions and to direct a verdict in the case before the jury has returned to court and its verdict has been announced and recorded.[41]

§ 261. Written Instruction Directing a Verdict Must be Presented With the Motion. Where a motion is made at the close of plaintiff's evidence to take a case from the jury and direct a verdict for the defendant, and is renewed at the close of all the evidence, a written instruction directing such a verdict must be presented with the motion. When a written instruction is not so presented, and error is assigned on the re-

37—Sundling v. Willey, — S. D. —, 103 N. W. 38.

38—Humiston, K. & Co. v. Wheeler, *supra;* J. A. & N. R. Co. v. Velie, 140 Ill. 59, 29 N. E. 706; L. N. A. & C. Ry. Co. v. Red, 154 *id.* 95, 39 N. E. 1086.

39—Pine v. Phoenix M. L. I. Co., 17 Maine 497; Alexander v. Sadler, 4 U. S. App. 324; McGregory v. Prescott, 5 Cush. (Mass.) 67; C. G. W. Ry. Co. v. Mohan, 58 N. E. 395, 187 Ill. 281, aff'g 88 Ill. App. 151.

40—C. B. & Q. R. Co. v. Murowski, 179 Ill. 77, aff'g 78 Ill. App. 661, 53 N. E. 572.

41—Garrett v. Farwell Co., 102 Ill. App. 31.

fusal of the court to give the instruction, the Supreme Court has not before it any legal question for determination.[42]

§ 262. Waiving Points Not Included in Motion for New Trial. Where a party moving for a new trial files points in writing specifying the grounds of his motion, he waives all existing causes for a new trial not specified in his motion, and on appeal is confined to those specified in the court below.[43]

§ 263. Directing a Verdict in Criminal Cases. The courts may direct the jury to find a defendant "not guilty," but in no circumstance is it known that any court at common law could direct the jury to find a defendant guilty when he has pleaded not guilty. The following instruction was held erroneous:

"You are instructed that under the charge contained in this information you may find the defendant guilty of murder in the first degree, murder in the second degree, or you may find him guilty of voluntary manslaughter, or of involuntary manslaughter; but you cannot find him not guilty."[44]

42—W. C. St. R. R. Co. v. Foster, 175 Ill. 396, 398, 51 N. E. 690; Cal. El. St. R. Co. v. Christenson, 170 Ill. 383, 48 N. E. 962; Swift & Co. v. Fue, 167 *id.* 443, 47 N. E. 761; Wenona Coal Co. v. Holmquist, 152 *id.* 581, 38 N. E. 946; Pierce v. Walters, 164 Ill. 560, 45 N. E. 1068; W. C. St. R. R. Co. v. Yund, 169 *id.* 47, 48 N. E. 208; Gilbert v. Watts de Golyer Co., *id.* 129, 48 N. E. 430; C. & N. W. Ry. Co. v. Delaney, *id.* 581, 48 N. E. 476.

43—Laverenz v. Ch. R. Co., 53 Iowa 321, 5 N. W. 156.

In C. C. R. Co. v. Hyndshaw, 116 Ill. App. 367, 373, "the defendant moved for a new trial in the court below, and filed his reasons in writing therefor. He did not assign the giving of instructions for plaintiff among those reasons. It is true it was held in I. C. R. R. Co. v. O'Keefe, 154 Ill. 508, 39 N. E. 606, that the action of the trial court in giving and refusing instructions may be reviewed without a motion for a new trial, but the Krueger case, cited below, in effect holds that this principle does not apply if a motion for a new trial has been made and points filed omitting that subject. This is manifestly because whatever is omitted from the specified points assigned on the motion for a new trial is thereby waived. O. O. & F. R. V. R. R. Co. v. McMath, 91 Ill. 104; W. C. St. R. R. Co. v. Krueger, 168 Ill. 586, 48 N. E. 442;" Mackey v. Baltimore R. Co., 19 D. C. 282; Maclen v. Bloom, 54 Miss. 365.

44—State v. Koch, 33 Mont. 490, 85 Pac. 272, 273.

In holding the instructions erroneous, the court said:

"We think the great weight of reason and authority supports the view that the court may not in any case upon a plea of not guilty

coerce the jury by a mandatory instruction to return a verdict of guilty. While the jury should take the law as laid down by the court and be governed by it, except in libel cases, wherein they are the judges of the law and fact (Const. art. 3, § 10; Paxton v. Woodward, 31 Mont. 195, 78 Pac. 215), the person accused may not be deprived of his absolute right to have the question of his guilt or innocence, not only of the particular crime charged, but of any included therein, determined by the jury without coercion by the court."

In State v. Thomas, 50 La. 148, 23 So. 250, in a similar case the court said:

"We are of the opinion," said the court in State v. Jones, 46 La. Ann. 1398, 16 So. 369, 'that on all trials for murder it is the duty of the district judge, *ex proprio motu*, without request from counsel, to charge the jury that among the verdicts which they are permitted by law to return, under an indictment charging a person with murder, is a verdict of manslaughter, as much so as to inform them that under an indictment for murder it is lawful for the jury to qualify their verdict by adding thereto, 'without capital punishment,' and that it is reversible error in any case that the judge should have failed to so inform them; and if this be so, how much stronger is the case where a judge not only fails to give such information, but expressly declares that in the case before him such a verdict would not be applicable.' The court cited, in support of this position, State v. Brown, 40 La. Ann. 725, 4 South. 897, and State v. Brown, 41 La. Ann. 411, 6 So. 670. Under this view, the failure to instruct the jury as stated was not a mere omission to charge, it was a misdirection. Upon this point the case is absolutely exceptional and entirely *sui generis*. It does not apply to lesser grades in matter of other crimes charged. It only applies to trials for murder, and is limited in those cases to informing the jury that a verdict of guilty of the crime of the lesser grade (manslaughter) may be found."

CHAPTER XIV.

UNANIMOUS OR MAJORITY VERDICTS—SPECIAL FINDINGS AND VERDICTS IN GENERAL.

§ 264. Unanimity of Verdict. Unanimity was a requisite of a valid verdict rendered by a jury either in civil or criminal cases at common law and under constitutions of most of the states of the Union. The unanimity referred to relates solely to the ultimate and final conclusion reached, and has no reference to the method by which it was reached, or the facts upon which the different jurors based their conclusions.[1]

Judge Cooley characterized unanimity of verdict as a relic of barbarism and superstition, and "repugnant to all experience of human passions, conduct and individuality." The

1—C. & N. W. Ry. Co. v. Dunleavy, 129 Ill. 132, 22 N. E. 15.

In Duncan v. City of Grand Rapids, 121 Wis. 626, 99 N. W. 317, 320, the court held that the whole twelve jurors must approve of and agree to all and every one of the answers made and returned.

United States Supreme Court, in the person of one of its justices, has passed condemnation upon this rule. It seems strange that for a long time and at least up to the year 1860, none of the nations of Europe adopted the trial by jury in any civil case, but nearly all adopted it in criminal cases, and all rejected the English common law idea of unanimity.

The government of the Island of Hawaii has adopted the practice of allowing a verdict of nine jurors to be brought in. Twelve jurors have been held not to be necessary to due process of law, as this means simply a requirement of trial according to law. The Fourteenth Amendment of the United States Constitution does not affect the validity of a verdict rendered by a majority of the jury, nor is the power of the states limited by this amendment. Due process of law is a term which requires that the trial shall be conducted according to law, both as to the nature of the charge and the mode of procedure, but does not determine what crime is, or what the mode of procedure should be. It certainly does not prevent changes from being made in the mode of procedure.[2]

§ 265. Unanimous and Majority Verdicts. The common law right of trial by jury of twelve men who must render unanimous verdict may undoubtedly be changed by statute, so that a less number than twelve may constitute a jury,[3] yet it cannot be left to the discretion of the court or to other contingencies to excuse some one or more jurors and to proceed with less.[4]

It is also held proper for the parties in action triable by jury at any time before final submission of a case to agree to take the verdict of the majority, which agreement being stated

2—State v. Bates, 14 Utah 293, 47 Pac. 78, 43 L. R. A. 33 n.

In the recent constitution of Utah it is provided that "In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors and in civil cases three-fourths may find a verdict." In Wyoming the courts have advanced a step further, so to speak, and have allowed women as jurors, not only in civil but in criminal cases and upon the grand jury also.

Marion v. State, 20 Nev. 233, 29 N. W. 911; Gut v. State, 9 Wall. 35; Duncan v. Mo., 152 U. S. 377, 14 Sup. Ct. 57; Calder v. Bull, 3 Dall 386.

3—Muirhead v. Evans, 6 Exch. 447; Bullard v. State, 38 Tex. 504; Davis v. State, 9 Tex. App. 634; Hill v. People, 16 Mich. 351; McRae v. Grand Rapids L. R. D. Co., 93 Mich. 399, 53 N. W. 561, 17 L. R. A. 750.

4—Logan v. Field, 192 Mo. 52, 90 S. W. 127; Saxton N. Bk. v. Bennett, 138 Mo. 494, 40 S. W. 970.

to the court and entered on the records bind the parties and in such cases a verdict signed by seven or more and duly rendered, when read and not disapproved by said majority, in every particular is as binding as if made by a full jury.[5]

The majority verdict just referred to is only authorized by virtue of statutory provisions, and then only by agreement of both parties, and applied for in the manner provided.

A law authorizing less than twelve jurors to render a verdict as where a juror has become ill has been held unconstitutional. The jury must be the common law jury of twelve men.[6] Where a juror is ill and unable to deliberate with the others, the verdict is a nullity, as it is not the verdict of all.[7] If a juror becomes ill during a trial another juror should be called in his place and the trial ordered to proceed *de novo*.[8]

Where a jury is discharged and a new trial ordered on account of the death or illness of one of the members, an objection against having any of the old jury on the new panel is a matter for the court to pass upon in its discretion.[9]

§ 266. Majority Verdict Discussed. The verdict of twelve men is considered more likely to be correct than that of a less number, although a majority. If a majority verdict were valid it would oftentimes result in a verdict upon first ballot. If the first ballot taken should show a majority for either side, and this result, considered final, the minority would have no chance to express their views upon the verdict.

The fact that it is otherwise gives opportunity for investigation and deliberation and oftentimes the correct views of the minority have providentially prevailed in bringing others to their point of view. Under a majority verdict there is also great opportunity for jurors to conceal the stand they have taken. There should be a right to question a juryman upon his courage to back up his convictions with his vote.

5—Code Iowa.

6—Kelsh v. Dyersville, 68 Iowa 137, 26 N. W. 38.

7—Denman v. Baldwin, 3 N. J. Law, 945.

8—City of Shawneetown v. Mason, 82 Ill. 337.

9—Sorenson v. Oregon P. Co., 47 Ore. 24, 82 Pac. 10.

In Belgium, trial by jury was established in 1830, decision of the majority was allowed by law. In France it was introduced in 1791, and provides for a majority verdict; so also in Germany. In Scotland a mode of getting at the facts is used called "procognition," a procedure by the sheriff; jury trial is an exception. By Victoria 17-18 s. 59, a verdict of nine was taken as a good verdict if whole of jury could not agree in twelve hours.

On the other hand, when a unanimous verdict of twelve must concur, a sufficiently obstinate juror can oftentimes acquit or convict even against the combined reason of the others who are lacking in force of character in maintaining their views.

It is generally held that the parties to a civil action may waive a trial by a full jury of twelve and that a verdict by a less number may be consented to and the verdict upheld,[10] and in some states it is provided that a jury of less than twelve may be had in courts not of record.[11]

§ 267. Verdict Found by Casting Lots, Compromise and Quotient Verdicts, Invalid. A jury should bring to bear upon the case the strength of their judgment and reason; they are trusted to bring in a verdict after honest deliberation and as a result of their conviction as to the rights of the parties, as based upon the evidence and governed by the instructions. A verdict which is found by the casting of lots is no verdict and should be set aside.[12] For the same reason a verdict which is obtained as a result of a compromise or a quotient verdict, is also invalid.[13]

§ 268. Special Verdicts Distinct from Answers to Special Interrogatories. A special verdict is distinct from, though often confused with, what are known as answers to special interrogatories. A special verdict is one finding a certain set of facts to be true and leaving the court to determine the conclusion of the law upon these facts. Special findings should only be asked upon ultimate and not purely evidential facts.[14] Special interrogatories may, however, be asked upon any particular feature of the case and answered by the jury in connection with the rendition of their general verdict.

§ 269. Special Interrogatories—Under Certain Conditions the Parties May Submit Special Interrogatories for the Jury to Answer. The trial court may upon its own motion submit special questions to the jury, but the statute in Illinois does

10—Scott v. Russell, 39 Mo. 407, 8 Ohio N. S. 205; State v. Bates, 14 Utah 293, 47 Pac. 78, 43 L. R. A. 33.

11—North Dakota, Washington, Utah and Missouri.

12—Mitchell v. Ehle, 10 N. Y. Wend. 595.

13—Roy v. Goings, 112 Ill. 656.

14—Lee v. Campbell, 4 Port. (Ala.) 198; Garfield v. Knight's Ferry, etc., 17 Cal. 510; Huffman v. State, 89 Ala. 33, 8 So. 28; City of Beardstown v. Clark, 104 Ill. App. 568; Crouch v. Denmore, 59 Iowa 43, 12 N. W. 759; Walker v. Dewing, 8 Pick. (Mass.) 520; Buckley v. Great Western Ry. Co., 18 Mich. 121; State v. Watts, 10 Ired. (N. C.) 369; Morse v Chase, 4 Watts (Pa.) 456.

not require a submission of such special questions to the counsel on either side.[15]

Questions as to mere evidential facts and which are not decisive of the issues are not proper to be submitted to the jury.[16] Special interrogatories which would not control the general verdict may be properly refused by the court[17] and where the answer, "Yes or No," would not be decisive of the case, such interrogatory should not be submitted to the jury.[18] The fact that a special interrogatory is leading is held no objection.[19]

§ 270. Where the General Verdict and the Special Findings Are Inconsistent. All reasonable presumptions are to be taken in favor of the verdict and nothing will be presumed in aid of the special findings where the special findings and the verdict are inconsistent.[20]

The general verdict will control where the special findings are inconsistent as between themselves,[21] otherwise where the special findings are inconsistent with the general verdict, judgment should be rendered on these special findings. The general verdict must not only be inconsistent with the special findings, but the inconsistency must be irreconcilable.[22] The general verdict and the special findings are inconsistent when the general verdict and the special findings do not warrant the rendering of the same judgment thereon.

No special verdict inconsistent with the admitted facts

15—Erwin v. Clark, 13 Mich. 10; Riley v. Wolfey, 60 Kan. 855, 55 Pac. 461; State v. Moore, 107 N. Car. 770, 12 S. E. 249; Bryan v. Lamson, 88 Ill. App. 261; Bower v. Bower, 146 Ind. 393, 45 N. E. 595; Williams v. Love, 1 Ind. Ter. 585.

16—Nelson v. Fehd, 104 Ill. App. 114; Pickett v. Handy, 5 Colo. App. 295, 38 Pac. 606; Schultz v. Cremer, 59 Ia. 182, 13 N. W. 59.

17—Locke v. Merchants Nat'l Bank, 66 Ind. 353; Boyce v. Snow, 187 Ill. 181, 58 N. E. 403.

18—Erwin v. Clark, *supra;* Jackson v. German Ins. Co., 27 Mo. App. 62; Wm. Graver Tank Works v. O'Donnell, 91 Ill. App. 524; Allen v. Lizer, 9 Kan. App. 548, 58 Pac. 238; People v. Wells, 8 Mich. 104.

19—C. C. Ry. Co. v. Bucholz, 90 Ill. App. 440.

20—Conroy v. Chicago, etc., R. Co., 96 Wis. 243, 70 N. W. 486; Smyth v. Marsich, 4 N. Y. App. Div. 171; Carman v. Ross, 64 Cal. 249, 29 Pac. 510; Kerr v. Goetz, 88 Ill. App. 41.

21—Boos v. State, 11 Ind. App. 257, 39 N. E. 197; State v. Curtis, 71 N. C. 56; Comm. v. Wagner, 138 Ind. 609, 38 N. E. 171; McLean v. Capper, 3 Call (Va.) 367; Moore v. Moore, 67 Tex, 293, 3 S. W. 284.

22—C. & N. W. Ry. Co. v. Dunleavy, 129 Ill. 132, 22 N. E. 15; Case v. C. M. & St. P. Ry. Co., 100

should be allowed to stand,[23] but where the proofs sustain the special finding the court may render a judgment on the special finding, although it is contrary to the general verdict.[24]

§ 271. Failure of Jury to Report Special Finding Requested —Special Findings Not Conclusive. Where the jury do not agree, or fail to report a special finding, especially where it would involve the material issues of the case, the court should not render judgment upon the general verdict.[25]

A party is not precluded or estopped from questioning the correctness of the replies in answer to questions propounded on a request for special findings from the jury.[26]

§ 272. Being Signed by Foreman and Read in Court, Will Constitute a Valid Verdict. It is a sufficient return of the verdict that it be signed by the foreman alone and announced in open court by the judge or clerk. The jurors should be asked if it is their verdict, but it is not necessary that it should be signed by all of the jurors.[27] The verdict as read by the court and assented to by the jurors constitutes their verdict.[28] The only proper verdict in the case is that verdict which has been rendered in open court and to which the jury have responded affirmatively as to whether it was their verdict or not; any other verdict copied by the clerk into the record, contrary thereto, will not stand.[29]

§ 273. Presence of Parties When the Verdict Is Returned. In all criminal trials the verdict should be returned in open court and in presence of the parties and their attorneys,[30] and

Ia. 487, 69 N. W. 538; Kerr v. Goetz, *supra*.

23—Murphy v. Weil, 89 Wis. 146, 61 N. W. 315; Kullman v. Greenebaum, 84 Cal. 98, 24 Pac. 49; Stodder v. Powell, 1 Stew. (Ala.) 287.

24—Fitzgerald v. Hedstrom, 98 Ill. App. 109; Benson & Judd Grain Co. v. Becker, 76 Mo. App. 375, 30 S. E. 347; Roberts v. Roberts, 122 N. C. 782.

25—Tourtelotte v. Brown, 1 Colo. App. 408, 29 Pac. 130.

26—Ill. S. Co. v. Mann, 197 Ill. 186, affd. 100 Ill. App. 367; 64 N. E. 328.

27—C. C. Ry. Co. v. Cooney, 196 Ill. 466, 95 Ill. App. 471, 63 N. E. 1029.

28—Catholic O. of F. v. Fitz, 181 Ill. 206, aff'g 81 Ill. App. 389, 54 N. E. 952.

29—Catholic O. of F. v. Fitz, *supra*.

30—Waller v. State, 40 Ala. 252; State v. Kelly, 91 N. C. 405.

Defendant must be present at the plea and arraignment. Hall v. State, 40 Ala. 698.

The courts hold that the defendant must be present when the jury is impanelled and sworn. Rolls v. State, 52 Miss. 391.

The presence of the defendant during the examination and tak-

especially so in capital cases. The presence of the defendant is necessary at all stages of the trial, as the rendering of a verdict is as much a part of the trial as the giving of evidence. In civil cases, as a general rule, the rendering of a verdict may properly take place in the absence of the parties.

§ 274. Must Follow Instructions, Be Consistent with and Decisive upon the Issue. To be a valid verdict it should follow the instructions of the court, otherwise it should be set aside as contrary to law.[31] It should be based upon and consistent with the issues in the case and be decisive upon the point in issue.[32] The verdict should not contradict the admissions contained in the pleadings nor should it make immaterial findings, but should decide upon a material point which would settle the rights of the parties involved in the case.

§ 275. Certainty as to Whom It Is Found in Favor of. The verdict should also be certain as to which party it was in favor of or against, as the case may be, either naming them distinctly as plaintiff or defendant or otherwise, so there may be no mistake.[33]

§ 276. Certainty as to What the Jury Intended to Award. The verdict must be certain as to what the jury intended to award, otherwise it would be so uncertain as to be no verdict at all. It is construed with as much liberality as possible in order to ascertain the meaning, but reason would not be stretched to the point of imagination in order to discover any ambiguous meaning. A verdict that there was no cause of action would be construed as a verdict in favor of the defendant.[34] Mere conjecture cannot be resorted to.

A verdict should state the amount assessed by the jury as

ing of testimony is certainly required. People v. Kohler, 5 Cal. 72.

So also must the defendant be present when the court instructs the jury. Bonner v. State, 67 Ga. 510; when the verdict is returned, Waller v. State, 40 Ala. 325, and when sentence is to be pronounced, Harris v. People, 130 Ill. 457, 22 N. E. 826.

31—Baker v. Thompson, 89 Ga. 486, 15 S. E. 644; Hallentack v. Hoskins, 12 Ia. 109; State v. West, 45 La. Ann. 925, 13 So. 173; Valerius v. Richard, 57 Minn. 443, 59 N. W. 534.

32—Pumphrey v. Walker, 75 Ia. 408, 39 N. W. 671; Fromne v. Jones, 13 Ia. 474; Miller v. Shackleford, 4 Dana (Ky.) 271; Mays v. Lewis, 4 Tex. 39.

33—Westfield Gas Co. v. Abernathy, 8 Ind. App. 73, 35 N. E. 399; Alexandria Co. v. Painter, 1 Ind. App. 116, 28 N. E. 113; Howard v. Johnson, 91 Ga. 319, 18 S. E. 132; Daft v. Drew, 40 Ill. App. 266; Elter v. Hughes, 41 Pac. 790.

34—Glaze v. Keith, 55 Neb. 593, 76 N. W. 15; Smith v. Mohn, 87

damages, unless there are means by which the court can compute the same, or where there is no dispute in the evidence concerning the amount involved, if a liability existed at all.

§ 277. Power of Court to Amend a Verdict. A trial court of record possesses power to amend its verdicts and to put them in such form as to show what the jury intended,[35] and any irregular and informal verdict rendered by a jury will be sustained, if from looking into the record it can be seen that it is responsive to the issues in the case.[36]

The court may correct a mere formal omission in a verdict or other informality to conform it in substance to the apparent intent of the jury,[37] but the court cannot alter or correct a verdict in any substantial manner so as to change its effect.[38] Where the verdict is not in the form intended by the jury, the court should direct the jury to retire and correct the same in accordance with their intention,[39] and when the court sends the jury out again to bring in a verdict proper in form, it is held proper and competent for a jury to change a verdict before it is finally recorded.[40] The court may amend a verdict in a mere matter of form, even where the jury has been discharged.[41]

§ 278. Power of the Jury to Amend or Correct a Verdict. It is said that a verdict is not valid and final until pronounced and recorded in open court.[42] It is the recorded verdict and

Cal. 489, 25 Pac. 696; McGupp v. State, 88 Ala. 147, 7 So. 35; Strawn v. State, 14 Ark. 549; Taylor v. Talman, 2 Root (Conn.) 291; Russel v. Mark, 32 Fla. 456, 14 So. 40.

35—Swofford Bros. v. Smith, etc., 1 Ind. Ter. 314, 37 S. W. 103; Armstrong v. Pierson, 15 Ia. 476; State v. Underwood, 2 Ala. 744; Harrison v. Jaquers, 29 Ind. 218; McKinney v. Armstrong, 97 Ill. App. 208.

36—State v. Craige, 89 N. C. 475; Allard v. Hamilton, 58 N. H. 416; W. C. St. Ry. Co. v. Horne, 100 Ill. App. 259; Wolfe v. Goodnue F. Ins. Co., 43 Barb. (N. Y.) 400.

37—People v. Jenkins, 56 Cal. 4; O'Brien v. Palmer, 49 Ill. 72; Fathman v. Tumilty, 34 Mo. App. 236; Cox v. Bright, 65 Wis. 417.

38—Sheehy v. Duffy, 89 Wis. 6, 61 N. W. 295; Crich v. Williamsburg City F. Ins. Co., 45 Minn. 444, 48 N. W. 198.

39—Strickland Wine Co. v. Hayes, 94 Ill. App. 476; Clough v. State, 7 Neb. 320; State v. Anderson, 24 S. C. 109; Ulley v. Smith, 32 S. W. 906.

40—People v. Jenkins, 36 Cal. 7; Arnold v. Kilchmann, 80 Ill. App. 229; Straughan v. State, 16 Ark. 37.

41—Ezell v. State, 103 Ark. 216; Alton v. Dooley, 16 Mo. App. 448; Gordon v. Higley, Morris (Ia.) 13; Italian-Swiss A. C. v. Pease, 194 Ill. 98, 62 N. E. 317.

42—Levells v. State, 32 Ark.

not the paper returned by the jury into court which constitutes the finding of the jury.[43] For this reason until a verdict is recorded it is held to be within the power of the jury to change, amend or correct it, but not after it has been recorded.[44] The jury may be allowed to correct the verdict in open court.[45]

In the state of Iowa it is held that a sealed verdict is equivalent to a rendition and recording in open court,[46] and for this reason such a verdict cannot afterwards be corrected by the jury. It is held otherwise in various jurisdictions.[47]

§ 279. Sealed Verdicts. It is held proper for a jury, under certain conditions, to seal their verdict and separate and return later to the court to render it, and a separation does not void a verdict in absence of prejudice. It is necessary for the entire jury to be present in person and to deliver the verdict in the presence of the judge. It is not proper for the judge to receive it by an agent, such as an attorney-at-law, and it must be before adjournment of court and during an open session of the court.[48]

§ 280. Verdict Returned on the Sabbath Day May Be Oral or Written. A verdict which has been made up and the deliberations of the jury closed on the Sabbath day is not objectionable.[49] Generally it is held that a verdict handed in on the Sabbath day is a good verdict.[50] However, in some courts it has been held that such a verdict is not good.[51]

Unless required by statute to be in writing, an oral verdict is valid. The validity of a verdict does not depend upon its being reduced to writing.[52]

585; Settle v. Alison, 8 Ga. 208; Garrett v. Farwell, 102 Ill. App. 31.

43—Clark v. Lamb, 8 Pick. (Mass.) 415; Frederick v. Mecosta, 52 Mich. 529, 18 N. W. 343; Brewer & Hoffmann Brg. Co. v. Hermann, 187 Ill. 40, affd. 88 Ill. App. 285, 58 N. E. 397.

44—Kirk v. Senzig, 79 Ill. App. 251; Mills v. Com., 7 Leigh (Va.) 757; Brooks v. Stephans, 100 N. C. 297, 6 S. E. 81.

45—Twomey v. Linnehan, 161 Mass. 91, 36 N. E. 590; State v. Baldwin, 14 S. C. 135; Stead v. Com., 19 Gratt. (Va.) 812.

46—Miller v. Mabon, 6 Ia. 456.

47—Loudy v. Clark, 45 Minn. 477, 48 N. W. 25.

48—Jessup v. Chicago R. Co., 82 Ia. 24, 48 N. W. 77; Anderson v. Hulet, 4 Colo. App. 448, 36 Pac. 309; Pierce v. Hasbrouch, 49 Ill. 23; Chicago v. Rogers, 61 Ill. 188; Stewart v. People, 23 Mich. 63.

49—Stone v. Bird, 10 Kan. 488.

50—McCorkle v. State, 14 Ind. 39; Baxter v. People, 8 Ill. 385.

51—Bass v. Irwin, 49 Ga. 436.

52—Griffen v. Larned, 111 Ill. 432.

CHAPTER XV.

APPEALS AND WRITS OF ERROR.

§ 281. **Appeals and Writs of Error—Historical.** The law has usually considered it an essential right of the parties to have an examination of the judgment upon their rights in an upper court, whenever they consider themselves to have been aggrieved by the lower tribunal. Under the old English common law this was accomplished by bringing the judgments of the courts of common pleas and other inferior tribunals under review of the King's Bench by writ of error which was the only remedy then used for the review of judgments of these courts, aside from certain instances where a writ of certiorari or a writ of false judgment was allowed.[1]

The right to appeal was unknown to the common law. It had its origin in the statutes of Westminster II.[2] It is a purely statutory right existing only by reason of statutory or constitutional provisions,[3] and does not exist otherwise except where specifically provided for,[4] so that where a statute authorizes appeals only in equity suits, an appeal would not lie to review any other action.[5]

Where appellate jurisdiction extends only to the review of questions of law, the determination of the trial court on questions of fact is conclusive, such findings can not be reviewed[6] except where the Appellate Court, as in equity cases, has power to try the whole case anew on appeal, both as to law and facts. The extent of such power depends upon statutory provision to a large extent.

§ 282. **Right of Appeal Purely Statutory.** The right of appeal being purely of statutory origin and unknown to the common law, does not exist except where expressly conferred by statute. It is held not to be in conflict with the constitu-

1—*Ex parte* Henderson, 64 Fla. 279; Coke's Littleton, 288.

2—12 Edward 1, Chap. 31; Conrow v. Schloss, 55 Pa. St. 28; Hake v. Strubel, 121 Ill. 321, 12 N. E. 676.

3—State v. Chittenden, 127 Wis. 468, 107 N. W. 500; Mau v. Stoner, 14 Wyo. 83, 83 Pac. 218; McGaugh v. Halliday, 142 Ala. 185, 37 So. 935; Sullivan v. Haug, 82 Mich. 548, 553, 46 N. W. 795.

4—Capaul v. Railway, 26 Ohio C. C. 578, 5 Ohio H. S. 262; State v. Bloomfield St. Bank, — Neb. —, 95 N. W. 790; Detroit & T. S. L. R. Co. v. Hall, 133 Mich. 302, 94 N. W. 1066; City of Davenport v. The D. & St. P. R. Co. 37 Ia. 624.

5—Mauck v. Brown, 59 Neb. 382, 81 N. W. 313; Wilson v. Wall, 2 Wash. 376, 7 Pac. 857; Montgomery v. Thomas, 40 Fla. 450, 25 So. 62.

6—Schendel v. Stevenson, 153 Mass. 351, 36 N. E. 689; Cook v. Cooper, 59 S. C. 560, 38 S. E. 218.

tion to deny this right to a party, especially where the right of review on a writ of certiorari, or writ of error, can be obtained.[7]

The legislature of the state may thus withdraw or regulate the right of review in a higher court.[8] The practices of the various states are conducted under a great diversity of statutory provisions, but, in all of these the right of review by writ of error or appeal exists in some form or other, together with other special statutory proceedings such as the writ of habeas corpus, bill of review, certiorari, audita querela, writ of review, writ of mandamus, all of which are considered more or less as being in the nature of appellate procedure.[9]

§ 283. Use of the Word "Appeal" in Modern Practice. The word "appeal" is used under our modern practice in different senses. In its original and technical sense it was a proceeding in the civil law subsequently adopted into equity practice for the removal of a case from the lower to the higher court, there to be tried *de novo*. It virtually amounted to a new trial without any reference to the former judgment or determination of the inferior court from which it was removed.[10]

An appeal removed the entire case, subjecting the facts as well as the law, for re-examination, thus differing from the common law writ of error which removed nothing, save questions of law.[11] In its most extensive meaning the word "Appeal" includes all proceedings of any nature whereby a suit, action, or matter of controversy is reviewed by another and higher tribunal.

While there is a remedy for every wrong, it may be more ample and capable of being pursued further in some cases than in others. For this reason it might be held that a trial without any review would fulfill the maxim.[12]

§ 284. Mandamus. The writ of mandamus cannot take the place of appeal or a writ of error and cannot be resorted

7—City of Minn. v. Wilkin, 30 Minn. 140-4, 14 N. W. 581; Tierney v. Dodge, 9 Minn. 153, 166.

8—Kepler v. Reinhardt, 162 Ind. 504, 70 N. E. 806; McGaugh v. Halliday, 14 Ala. 185, 37 So. 935; Capaul v. Ry., 26 O. C. C. 578.

9—People v. Bacon, 18 Mich. 247.

10—State v. Doane, 35 Neb. 707, 53 N. W. 611; U. S. v. Wonson, 28 Fed. 675.

11—Works v. Leavenworth, 52 Neb. 418, 72 N. W. 592.

12—Fleshman v. McWhorter, — W. Va. —, 46 S. E. 118.

to where the remedy by appeal may be had[13] Mandamus is in the nature of supervisory judicial control and may be classed as appellate action where it issues to direct the action of a legal tribunal.[14]

Mandamus when thus used may be defined as a command issuing from a court of law of competent jurisdiction, directed to some inferior court, requiring them to do some particular thing. It is a prerogative writ designed to afford a remedy where, without it, the party would be subjected to serious injustice.[15]

Where it thus issues to direct the action of a legal tribunal, it is an exercise of supervisory judicial control. In all other cases it is generally, if not always, considered an exercise of original jurisdiction. In this sense the writ is regarded as binding on the judge officially, whoever he may be, at the time the writ is issued to the court in question.[16]

The writ of mandamus may issue from the supreme or appellate courts, commanding the lower court to sign the bill of exceptions and correct and properly present it within the prescribed time,[17] although, on the contrary, it has been held that it will not lie to command a judge of a lower court to seal a bill of exceptions under the statute of Westminster II, but that the proper practice is to have a special writ issue to cover this exigency, in which the circumstances of the case are set forth and the judges are commanded to affix their seal, if the same is true.[18]

The usual method of procedure in procuring the writ of mandamus is by petition or motion to show cause against a person to whom the proceedings are directed. The modern practice is, after notice has been served on a party ordered to do some particular act, to present a petition setting forth

13—Rector v. St. Clair Circuit Judge, 139 Mich. 156, 102 N. W. 643; Horton v. Gill, — I. T. —, 82 S. W. 718.

14—People v. Bacon, 18 Mich. 247 (252).

15—State v. Williams, 69 Ala. 311; King v. University, 1 W. Black K. B. 552; Rex v. Baker, 3 Burn. 1265.

16—People v. Bacon, *supra;* Marbury v. Madison, 1 Cranch 137.

17—People v. Zane, 105 Ill. 662; People v. Anthony, 129 *id.* 218, 21 N. E 780; Hawes v. People, 129 *id.* 123, 21 N E. 770; People v. Williams, 91 *id.* 87; People v. Prendergast, 117 *id.* 588, 6 N. E. 695; People v. Donnelly, 59 Ill. App. 413.

18—Conrow v. Schloss, 55 Pa. St. 28.

a clear right to have the act performed and showing that the same is within the power of the person to do this act, together with all material facts upon which the party relies.[19]

§ 285. Certification of Questions a Mode of Appeal. Certification of questions was a provision made by the Act of Congress, providing that, upon failure of the judges to agree upon questions arising during the course of the trial, such questions might be certified for decision by the Supreme Court. It seems that the reason for this provision arose from the fact that the Circuit Court consisted of only two judges and was made to obviate the difficulty which might arise from their failure to agree.[20]

With the written consent of the parties as provided by statute, in Connecticut, questions of law may be certified to the Supreme Court for advice, which will govern the lower court in its judgment, decree or decision.[21]

In Illinois there is a similar provision, when the majority of the judges of the Appellate Court are of the opinion that a case decided by them involving questions of law of importance, wherein the judgment is less than $1,000.00, they may grant a certificate of importance, when an application is made within the time limit for appeal.[22]

In Iowa the trial court must certify that the cause is one in which appeal should be allowed where the amount in controversy does not exceed $100.00.[23] This certificate must state that it involves the determination of questions of law and indicate what such questions are,[24] and such certificate must be set forth in the abstract.[25]

Similar provisions are found in Kansas,[26] also, in Indiana,[27] Maine,[28] and Massachusetts—where it is provided "that ques-

19—People v. Mayor Ch'go, 51 Ill. 28.

20—U. S. Rev. St. 1878, Sec. 651; 17 U. S. Stat. 196.

21—N. Y. & C. Ry. Co. v. Boston Ry., 36 Conn. 196; Dowd v. Ensign, 68 Conn. 382, 36 Atl. 810.

22—Kirkwood v. Steel, 168 Ill. 177, 49 N. E. 193; McLachlan v. McLaughlin, 126 Ill. 427, 18 N. E. 544.

23—Iowa Code, Sec. 4110; Johnson v. Marshall, — Ia. —, 80 N. W. 395; Sibley v. McCausland, 81 Ia. 757, 46 N. W. 1072.

24—Benge v. Eppard, 110 Iowa 86, 81 N. W. 183.

25—Barnes v. Ind. Dist., 51 Iowa 700, 1 N. W. 618.

26—Mo. Pac. R. Co. v. Kimball, 48 Kan. 384, 29 Pac. 604; Loomis v. Bass, 48 Kan. 26, 28 Pac. 1012.

27—Woodard v. Baker, 116 Ind. 152, 18 N. E. 524.

28—Me. Rev. St., Ch. 77, Sec. 75.

tions of law may, by consent of parties, be reported to the Supreme Court for determination before verdict."[29]

In the federal courts certification of questions of the lower court to the Supreme Court is in use.[30]

§ 286. Writ of Certiorari. Where a party has been deprived of his right of appeal without fault on his part in regard thereto, as, for instance, where his failure to appeal was caused by some act on the part of the opponent and not within his control, it is held that an appellate court will take cognizance of his case and review the same by writ of certiorari.[31]

At common law a writ of certiorari was an original writ which issued out of chancery or the court of King's Bench to the judges of inferior courts, commanding them to return the record of a cause pending before them, in order that the party might have the more sure and speedy justice.[32]

It was not a substitute for an appeal, nor intended for the purpose of correcting errors of fact.[33] In its nature it was a revisory remedy for the correction of errors of law appearing on the records,[34] and indeed, if the appeal was based on the facts or merits of the case, a writ of certiorari would not lie, for in this case an appeal is the proper remedy.[35] Certiorari should not be used where a remedy by appeal exists.[36]

In order to use the writ of certiorari, it is essential that the applicant be a party to the record, or that he be in a position so that the decision is directed against him or his property, or be a party constructively in that the enforcement of the decision would involve special, immediate and direct in-

29—Cowley v. Train, 124 Mass. 226, Stat. 1869, Ch. 438. See also Minn. Stat. 1894, Sec. 1589; N. Y. Code Civ. Pr., Sec. 190; Wis. Laws 1897, Ch. 183; Rosenow v. Gardiner, 99 Wis. 358, 74 N. W. 982.

30—Fed. Stat. Mch. 3, 1891, 26 U. S. Stat. At. L. Ch. 517; 17 U. S. Stat. et al. 196, U. S. Stat. Rev. Sec. 650; Bartholomew v. H. School Trustees, 15 Fed. 304, 105 U. S. 6.

31—Graves v. Hines, 166 N. C. 323, 11 S. E. 362; Hygienic P. I. Mfg. Co. v. Rawley A. L. Ry. Co., 125 N. C. 17, 34 S. E. 100.

32—Dean v. State, 63 Ala. 153; Smith v. Jones Co., 30 Iowa 531; Hamilton v. Spiers, 2 Utah 225; Drawne v. Stimpson, 2 Mass. 441; Smith v. Smith, 101 Mo. 174, 14 S. W. 108.

33—Dean v. State, 63 Ala. 153.

34—Lamar v. Comm's, 21 Ala. 772; Glaze v. Blake, 56 Ala. 379; Dean v. State, 63 Ala. 153.

35—Dean v. State, 63 Ala. 153; 2 Bac. Abr. 165.

36—Clark v. Rosier, 10 Ida. 348, 78 Pac. 358; State v. Leche, 36 So. 868.

jury to his interests.[37] As a general rule this writ will lie in all cases where no other adequate remedy exists by which an erroneous determination can be reviewed.[38]

§ 287. **Same Subject—Continued.** In the courts of England the writ of certiorari was awarded to remove any case from the lower courts to the court of King's Bench which had a superintendence over all inferior courts of criminal jurisdiction. The reason for the existence of this writ lies in the fact that every indictment was brought at the instance of the King, and, consequently, in him rested the prerogative of removing a suit to whatever court he pleased.[39]

The general power of supervision which thus pertains to the court of King's Bench in England, also pertains in general to the various courts of the several states.[40]

The supervising court from which the writ issues must stand in the relation of a superior court to an inferior; thus, a writ cannot be sued out from the federal court to remove proceedings in a state court at the instance of a foreigner, not a party to the original suit, for the reason that the state court is not an inferior court to the federal court in jurisdiction.[41]

§ 288. **Writ of Certiorari in the Various States.** In Massachusetts it is held that the Supreme Court has as extensive powers in respect to the issuance of such writs as the court of King's Bench in England.[42] So also, in New Jersey,[43] in

37—Chate v. Chittenden, 127 Wis. 468, 107 N. W. 500-9; People v. Andrews, 52 N. Y. 445; People v. Wagner, 7 Lans. (N. Y.) 467; Palmer v. Circuit Judge, 83 Mich. 528, 47 N. W. 355; Strong v. Co. Comm., 31 Me. 578; People v. Knowles, 47 N. Y. 415; Stone v. Miller, 60 Iowa 243, 14 N. W. 781; Groves v. Richmond, 53 Iowa 570, 5 N. W. 763; Welch v. County Court of Wetzel Co., 29 W. Va. 63, 1 S. E. 337; Miller v. Jones, 80 Ala. 89; Tallon v. Mayor of Hoboken, 60 N. J. Law 212, 37 Atl. 895; Wood on Mandamus, p. 151.

38—Independent Pub. Co. v. Am. Press Ass'n, 102 Ala. 475, 15 So. 947; Price v. Doan, — Ari. —, 60 Pac. 893; Lyons v. Green, 68 Ark. 205, 56 S. W. 1075; People v. County Judge, 40 Cal. 479; Indiana, etc., R. Co. v. McCoy, 23 Ill. App. 143.

39—*Ex parte* Vallandigham, 1 Wall. (U. S.) 249.

40—Faut v. Mason, 47 Cal. 8; Miliken v. Huber, 21 Cal. 169; Stuttmeister v. Superior Ct., 71 Cal. 323, 12 Pac. 270.

41—Washington v. Huger, 1 Desaussure (S. C.) 360.

42—Att'y Gen'l v. Boston, 123 Mass. 471.

43—Whitehead v. Gray, 12 N. J. L. 36-41.

North Carolina,[44] in Pennsylvania,[45] Tennessee,[46] and also, in the Federal Courts.[47]

In Missouri and Massachusetts the writ is in the nature of a writ of error and operates in a similar manner.[48] In Massachusetts these writs are issued to correct errors in all proceedings that are not according to the courts of the common law.[49] It is, in reality, a writ in the nature of a writ of error, addressed to an inferior court, whose procedure is not according to the courts of the common law, and upon its return the record must be inspected in its entirety and the court is bound to determine whether or not the proceedings are legal or erroneous. It is not granted as a matter of course, but only where the court is satisfied that substantial justice requires it.

In New York the writ performs the same duty as a writ of error, at least in courts of inferior summary jurisdiction.[50]

Wherever it shall appear that the court has exceeded its jurisdiction, and the party aggrieved has no other mode of appealing to a higher tribunal, a writ of certiorari may be asked, usually by motion, or petition, or by the filing of affidavits. After the writ has been ordered and served on the inferior court it devolves upon such court to transmit a complete transcript of the record of the proceedings to the court, granting the writ.[51] Upon the return of the writ the cause is reviewed on the record only. The writ of certiorari will lie in all cases where the petition alleges want of jurisdiction of the parties or subject matter. All questions of fact cannot be reviewed by writs of certiorari.

In Texas it was held that after an appeal has been submitted the record may be perfected by certiorari so as to incorporate therein the judgment of the trial court which had been omitted and thereby give the appellate court jurisdiction of the appeal.[52]

44—State v. Swepson, 83 N. C. 587.

45—Com. v. Balph, 111 Pa. St. 365, 3 Atl. 220.

46—Bab. v. State, 2 Yerg. (Tenn.) 173.

47—U. S. Stat. at Large, 1889-91, p. 828, c. 517, § 6.

48—C. R. I. & P. R. Co. v. Young, 96 Mo. 39, 43, 8 S.W. 776; Farmington v. Co. Com's, 112 Mass. 206-212.

49—Gen. Stat. Mass., c. 145, § 8; Farmington v. Co. Com's, 112 Mass. 206-212.

50—Stone v. N. Y., 25 Wend. (N. Y.) 167.

51—Dooly v. Martin, 28 Ind. 189; Hay v. Lewis, 39 Wis. 364; Evans v. Morris, 6 Mich. 69; Wood v. Newkirk, 15 Ohio St. 295.

52—St. L. R. Co. v. Wills, — Tex. Civ. App. —, 30 S. W. 248.

Wherever an omission or defect appears in the record, the court of review may of its own motion issue a writ of certiorari to the lower court to make the necessary corrections.[53] Where notice has been served on opposing party and statements showing defects in record have been filed with the upper court, the writ of certiorari will be issued.[54]

§ 289. Certiorari and Writ of Error Distinguished. It may be held as a general proposition that a writ of error lies where the proceedings are according to the common law. In all other cases the proper writ to review the action is that of certiorari. These two writs are similar in that no one but a party to the record has a right to maintain them, the one being a matter of right while the other, the writ of certiorari, is a mere matter for the sound discretion of the court to grant or refuse.[55]

§ 290. Writ of Prohibition and Motion in Error. A motion in error which is in use in Connecticut can scarcely be distinguished from a writ of error, excepting that it is held in some respect more convenient and, perhaps, less expensive.[56] Prohibition will not lie where appeal or error can be used as a remedy.[57]

The common practice in relation to the procuring of a writ of prohibition is upon a motion to show cause served upon the adverse party, why the writ should not issue,[58] and in the absence of statutory provisions[59] this practice is still applicable.[60]

The usual modern practice is that any person aggrieved may apply to the court empowered to issue such writs by

53—Porter v. Garrett, 1 Green (Ia.) 368; Franklin Academy v. Hall, 16 B. Mon. (Ky.) 377; State v. Beale, 119 N. C. 809, 25 S. E. 815; Toledo, etc., R. Co. v. Chenoa, 43 Ill. 209; Phelps v. Osgood, 34 Ind. 150; Green v. Bulkley, 23 Kan. 130.

54—Brown v. Lathrop, 84 Iowa 431; Allen v. McLendon, 113 N. C. 319, 18 S. E. 205; Waterman v. Raymond, 40 Ill. 63.

55—Bath Bridge Tp. Co. v. Magoun, 8 Me. 292; Porter v. Rumery, 10 Mass. 64; Shirley v. Lunenburg, 11 Mass. 379; Grant v. Chamberlain, 4 Mass. 611; Haines v. Corlis, 4 Mass. 659; Glover v. Heath, 3 Mass. 252.

56—Finch v. Ives, 24 Conn. 387.

57—State v. Tallman, 38 Wash. 132, 80 Pac. 272.

58—Stadford v. Neale, Stra. 482.

59—S. C. Soc. v. Gurney, 3 Rich. S. C. (N. S.) 51.

60—Buggin v. Bennett, Burr 2037; *ex parte* Williams, 4 Ark. 537.

petition or information, verified by affidavit[61] and upon hearing of the matter involved, the court will grant such writs prohibiting the inferior court from further proceeding in the matter in question.[62]

The effect of this rule upon subordinate courts was to stay all proceedings therein and upon the return thereof the rule would be made absolute or discharged, as might be deemed proper,[63] and if the point involved appeared doubtful, the petitioner might be ordered to state facts upon which he relies, so they could be either admitted or denied by the adverse party. The petition should show a clear right, that the petitioner has no other legal remedy,[64] and that the act requested is within the power of the inferior court to perform.[65]

The usual course of pleadings would then follow and the matter be decided either upon plea, demurrer or on its merits. If it then appeared to the court that there was a sufficient ground for the petition in point of law, it would be granted.[66]

Habeas Corpus can not be used where the remedy by appeal is adequate.[67]

§ 291 Meaning of Word "Appeal" in Various States. The word *appeal* under the various statutory provisions is used to designate a review by writ of error or a proceeding by appeal in equity and differs greatly in the various jurisdictions.

In Arkansas it is held that the word appeal refers to actions at law, although it is a term expressly derived from the civil law, which is purely statutory.[68] In Connecticut the word appeal has been used to designate the procedure for review of questions at law.[69] In New York it is held that an appeal is a

61—*Ex parte* Williams, 4 Ark. 537; Birch v. Hartung, 23 Gratt. 51; Doughty v. Walker, 54 Ga. 595.

62—Mayo v. James, 12 Gratt. 17.

63—People v. Thompson, 25 Barb. 73.

64—People v. Mayor of Ch'go, 51 Ill. 28.

65—*Ex parte* Williams, 4 Ark. 537.

66—Wherever on the face of the record it appears the court had no jurisdiction or has exceeded its jurisdiction.

Ex parte Smith, 23 Ala. 94; *ex parte* Reid, 50 Ala. 439; State v. Rightor, 44 La. Ann. 298; State v. Probate Ct., 19 Minn. 117; State v. Ward, 70 Minn. 58, 72 N. W. 825; Walcott v. Wells, 21 Tex. 47; People v. Westbrook, 89 N. Y. 152.

67—Gillespi v. Rump, 163 Ind. 457, 72 N. E. 138.

68—Carnall v. Crawford County, 11 Ark. 604.

69—White v. Howd, 66 Conn. 264, 33 Atl. 915.

substitute for the writ of error. "It is the method by which all mistakes in the judgment of an inferior court are rectified, except when otherwise provided."[70]

In Nebraska the word appeal is confined under the statutes to suits in equity and does not extend to actions at law.[71] "It designates the particular form of review whereby a case is transferred, after decision, to a higher court for re-examination of the whole proceeding and for final judgment or decree, in accordance with the result of such re-examination."[72]

In Ohio the appeal itself "vacates the whole proceeding as to findings of fact as well as law, and the case is heard upon the same or other pleadings and upon such competent testimony as may be offered in that court. The whole subject is taken up *de novo* in respect to pleadings, necessary parties, trial and judgment, in like manner, as if the cause had never been tried before."[73]

In Pennsylvania it has been held that the appeal brings up the whole case and not merely the records.[74]

§ 292. **Common Remedies of Appeal and Error—Special Remedies.** The supreme courts have conferred upon them appellate jurisdiction only in cases of chancery and are courts for the corrections of errors in actions at law.[75] As a general rule, this may be said to be true of all appellate courts, and, aside from this, they have especially conferred upon them, appellate jurisdiction from all inferior courts and tribunals, together with a supervisory control over the same. They also have the power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and all other writs necessary to give them general control over inferior courts and tribunals.[76]

If the common remedies of appeal and error are adequate, they should be used and it is considered obligatory upon the

70—People v. Justices, 2 Abb. Pr. N. Y. 126.

71—Cary v. Kennedy Natl. Bank, 59 Neb. 169, 80 N. W. 484; Whalen v. Kitchen, 61 Neb. 329, 85 N. W. 278; State v. Bloomfield St. Bank, — Neb. —, 95 N. W. 780.

72—Neb. L. & T. Co. v. Lincoln R. Co., 53 Neb. 246, 73 N. W. 546.

73—Mason v. Alexander, 44 Ohio St. 318, 7 N. E. 435.

74—Springer v. Springer, 43 Pa. St. 518.

75—Sherwood v. Sherwood, 44 Iowa 192; Const. of Iowa, Art. 5, § 4; Mauck v. Brown, 59 Neb. 382, 81 N. W. 313; Wilson v. Wall, 2 Wash. 376, 7 Pac. 857; Montgomery v. Thomas, 40 Fla. 450, 25 So. 62.

76—Const. of Wis., Art. 7, Sec. 8; Const. of Mich., Art. 6, Sec. 8.

parties to use such remedies and not the special or extraordinary methods of review.[77]

In the absence of any provision making an appeal the sole remedy of the common law the right of writ of error may still be used,[78] but where the method provided by statute is exclusive it supersedes all others and writs of error cannot be used.[79] The suing out of a writ of error is, in reality, the beginning of a new suit.[80]

§ 293. Notice of Appeal. A notice of appeal is usually made to the opposite party when the appeal is prayed in open court. It may, however, be served and returned in the same manner as an original notice in a similar action, and filed in the office of the clerk of the court in which the judgment appealed from was rendered.[81]

This has been held merely directory and not affecting the appeal by non-compliance therewith,[82] and, where one is not thus served, the appeal cannot be prosecuted as to him.[83] The notice must be signed by the appellant or his attorney or the appeal will be invalid and the court without jurisdiction, even though the notice is accepted by attorney for the appellee.[84] The service of notice of appeal and its return follows very closely the general method in civil actions. A failure to give such notice does not always cause a dismissal,[85] neither does a defective return cause a dismissal.[86]

77—State v. J. C. of Tp. No. 1, 31 Mont. 258, 78 Pac. 498; State v. D. C. of Ramsey Co., 40 Minn. 5, 40 N. W. 889.

78—Molony v. Dows, 6 N. Y. Abb. Pr. 86.

79—Munson v. Mudgett, 14 Wash. 666, 45 Pac. 306.

80—Eau Claire C. Co. v. W. Br. Co., 213 Ill. 561, 73 N. E. 430.

81—Code of Iowa 1897, Sec. 4115; R. S. Wis. Sec. 3049.

82—Littleton Sav. Bank v. Osceola Land Co., 76 Iowa 660, 39 N. W. 201.

83—Baxter *et al.* v. Rollins, 110 Iowa 310, 81 N. W. 586.

84—State Sav. Bank v. Ratcliffe, 112 Iowa 662; Hogueland v. Arts, 113 Iowa 634, 85 N. W. 18; American Emigrant Co. v. Long, 105 *id.* 194, 74 N. W. 940; Yates v. Shepadson, 37 Wis. 315; Koch v. Hustis, 110 Wis. 62, 85 N. W. 643.

85—Failure to give notice of appeal is held not a jurisdictional defect and in regard to appeals in chancery, it does not entitle the appellee to a dismissal as a matter of right.

Simpson v. Mansfield, etc., R. R. Co., 38 Mich. 626; Garratt v. Litchfield, 10 Mich. 451; Shook v. Proctor, 26 Mich. 283.

86—An improper return has been held a cause for dismissal. Tenney v. Madison, 99 Wis. 539, 75 N. W. 979; Ryan v. Philippi, 108 Wis. 254, 83 N. W. 1103.

§ 294. **Time for Appeal.** The time within which an appeal must be prayed and perfected is regulated by statute.[87] An appeal not perfected within the prescribed time in absence of any statutory provision or excuse relieving such party, will be dismissed.[88]

This prescribed time is in the nature of a statute of limitation and will bar further appeal.[89] It is generally held that infants, married women, and lunatics, and persons who are under disability, are not concluded by this statute. In order to secure the benefit from such disability it must be especially pleaded on appeal.[90] Appeal may be prayed at any time during the term of the court at which the judgment was rendered.[91] In computing the time within which the transcript of the record must be filed, the day on which the judgment was rendered and not the last day of the term is taken.[92]

The time within which an appeal must be taken is computed from the day on which judgment was rendered and excluding it.[93] The general rule seems to be that the time for appealing can not be extended by the court of appeals,[94] and also, it is held that the lower court is without power to extend the statutory time, unless such power is specially granted by statute.[95]

Negligence of counsel causing a delay is no excuse for a failure to perfect the appeal in time. In some jurisdictions it is held that the time for appealing may be extended by agreement of parties.[96] In other states it is held no such agreement extending time for appeal will be recognized,[97] and an expected agreement for extension of time will not excuse perfecting the appeal in time.

87—Smith v. Boswell, 117 Ind. 565, 20 N. E. 263.

88—Young v. Rann, 111 Iowa 253, 82 N. W. 785; James v. Dexter, 112 Ill. 489.

89—Young v. Rann, 111 Iowa 253, 82 N. W. 785; Carney v. Baldwin, 95 Mich. 442, 54 N. W. 1081.

90—Vordermark v. Wilkinson, 147 Ind. 56, 46 N. E. 336.

91—Balance v. Frisby, 1 Scam. 595; McMillan v. Bethold, 40 Ill. 34; I. C. R. v. Johnson, 40 Ill. 35.

92—T. P. & W. R. v. Coomers, 40 Ill. 27.

93—Bennett v. Keene, 67 Wis. 154, 29 N. W. 207; Ritche v. Fisher, 85 Iowa 560, 52 N. W. 505.

94—Burns v. Pinney, 53 Minn. 432, 55 N. W. 540; Van Steenwyck v. Miller, 18 Wis. 320.

95—Atty. Gen. v. Barber, 121 Mass. 568.

96—Adams v. Reeves, 74 N. C. 406.

97—Hall v. Gilman, 90 Wis. 455, 63 N. W. 1044; Louisville v. Boland, 70 Ind. 595; Tootle v. Shiry, 52 Neb. 674, 72 N. W. 745.

The extending of time for a bill of exceptions is not the same as extending the time fixed by statute for appealing.[98]

As a general rule the failure of an officer to do an act not required by law of him will not extend the time for an appeal.[99] So, also, the failure of the clerk to make out a transcript in time will not excuse a party who has failed to perfect his appeal in proper time.[100] Nor will the fact that there was some difficulty in finding the judge before whom the bill should be signed.[1]

The general rule seems to be that in order for the appellee to take advantage of the defense that the appeal was not taken in proper time, a motion to dismiss must be made,[2] but where it appears from the face of the record, it has been held in some jurisdictions, the court will of its own motion dismiss such appeal.[3]

§ 295. Who may Appeal. As a general rule only those may appeal who are the original parties or their legal representatives of record,[4] but the real test goes further and takes in persons who are aggrieved or who have some interest of a substantial nature adverse to the judgment.[5] Thus, an executor is held to be a party who may appeal from an order of distribution where the estate is not sufficient to meet the claim,[6] but persons who suffer no loss by the judgment, or who are in no manner affected thereby, can not appeal.[7] A legal interest must exist which may be affected by the judgment appealed from.[8]

In some states the statutes expressly confer upon "every person aggrieved by any final judgment or decree in any civil cause" the right to appeal therefrom.[9]

98—Jackson v. Hasely, 87 Fla. 205, 9 So. 648.

99—Cameron v. Calkins, 43 Mich. 191, 5 N. W. 292.

100—Redway v. Chapman, 48 Mo. 218.

1—Reliable v. Goldstein, 110 Ga. 265, 34 S. E. 279.

2—Teller v. Willis, 12 Mich. 268; Telford v. Ashland, 100 Wis. 238, 75 N. W. 1006.

3—Marder v. Campbell P. Co., 76 Ill. App. 431; Atty. Gen. v. Barber, 121 Mass. 568.

4—Shabanaw v. Thompson Co., 80 Iowa 621, 50 N. W. 781; Ferguson v. Lucas County, 44 Iowa 701; People v. Ry. Com., 160 N. Y. 202, 54 N. E. 697; State v. Bloomfield St. Bank, — Neb. —, 95 N. W. 791.

5—Harrigan v. Gilchrist, — Wis. —, 99 N. W. 909.

6—In re Murphy's Estate, 145 Cal. 464, 78 Pac. 960.

7—Demarest v. Holdman, 34 Ind. App. 685, 73 N. E. 714; Heidbreder v. Sup. In. Stor. Co., — Mo. —, 83 S. W. 469.

8—Abb. App. 97 Me. 278, 54 Atl. 755.

9—Civ. Pro. (N. C.), Sec 547:

In the County Courts of Illinois a similar right to appeal seems to obtain,[10] but the statutory privilege of appeal is held in that state to extend only to the parties to the suit.[11]

A party seeking to reverse a judgment must have been in some manner injured thereby. The fact that error is committed will not be sufficient to warrant him in making an appeal, unless he has suffered some disadvantage thereby.[12] For this reason it is held that a party who has parted with all his interest in the controversy can not appeal. His right is terminated whenever, during the progress of the case, his interest is at an end.[13]

One who is not a party is under the necessity to make himself a party to the suit in order to prosecute an appeal either on motion or otherwise, and if his motion is denied, he may properly appeal from such decision and in this way bring himself within the jurisdiction of the court,[14] and, even though the persons are the real parties in interest, as for instance, an action should be brought by "A" for the use of "B," yet such unnamed person would not be entitled to bring an appeal.[15]

The only remedy for one who is not a party to secure a hearing on appeal is to secure a substitution of his name upon the record in place of the party. It is requisite, however, that such substituted party make a showing that he is aggrieved by the judgment or ordinance appealed from, and before he can be said to be thus aggrieved, it must be shown that the judgment of which he complains had some binding force upon his person, his property or his rights. It must affect him in a greater measure than a mere remote or contingent liability.[16]

It has already been stated that only the actual party to the record, or the aggrieved party, may appeal. Not infrequently, however, it transpires that both parties find cause for appeal by reason of some ruling or error occurring in the trial, and

Mo. Rev. Stat., Sec. 3710; Nolan v. Johns, 108 Mo. 431, 18 S. W. 1107.

10—Weir v. Gand, 88 Ill. 490.

11—Anderson v. Steger, 173 Ill. 112, 50 N. E. 665.

12—Morrison v. N. Y. El. Ry. Co., 57 N. Y. St. Rep. 246; Hooper v. Beecher, 109 N. Y. 609, 15 N. E. 742.

13—Traders' Ins. Co. v. Carpenter, 85 Ind. 350; Meikel v. Gr. Sav. Fund Society, 24 Ind. 78; Masonic Temp. Co. v. Com., 11 Ky. Law Rep. 383, 12 S. W. 143; Bush v. Rochester City Bk, 48 N. Y. 659.

14—People v. Grant, 45 Cal. 97.

15—Yarish v. Cedar Rapids Ry. Co., 72 Iowa 556, 34 N. E. 417; Union Nat. Bk. v. Barth, 179 Ill. 83, 53 N. E. 615, aff'g 74 Ill. App. 383.

16—Ross v. Wigg, 100 N. Y. 243. 3 N. E. 180.

both parties secure a re-examination of their respective contentions in the appellate court. Where the one party has prosecuted an appeal to a final determination, the other party is precluded thereby and can not afterwards have an appeal,[17] nor can a party who has appealed again bring up the case for review after a final determination thereon in the absence of the occurrence of new proceedings in the case.[18] This rule, of course, does not affect the right of appeal for the second time in the same case where a new trial has been ordered on the first appeal.[19]

A party may prosecute a writ of error to reverse a judgment in his own favor, or may appeal from the same, as, for instance, where he has not obtained all he thinks himself entitled to,[20] but, as a usual rule, where the decree is in the party's favor, he is not entitled to an appeal and if he does appeal the judgment will not be reversed when made upon a finding of facts,[21] nor can he review findings of facts in his own favor.[22]

An appeal cannot be allowed merely for the reason that the appellant is without a remedy, as the court has no such inherent power in the absence of statutory provisions.[23] The right to appeal is a creature of the legislature, created by and subject to regulation or withdrawal at any time by the legislature, and its withdrawal is retroactive in effect upon all pending cases. It is held, however, that the withdrawal of the right of appeal has no application to cases upon which final judgment has been rendered prior to the taking effect of such act, unless the terms of the statute specifically show such intent.[24]

Under this theory that the right of appeal is purely statutory

17—Mooney v. Brinkley, 9 Ark. 449; Page v. People, 99 Ill. 418; Horne v. Harness, 18 Ind. App. 214, 47 N. E. 688.

18—Ford v. David, 13 How. Pr. N. Y. 193; Smith v. Shafer, 50 Md. 132; Davis v. Alexander, 1 Iowa Gr. 86; Meikel v. Gr. Sav. Fund, 24 Ind. 78.

19—Ford v. David, *supra.*

20—Fleshman v. McWhorter, 46 S. E. 116, 54 W. Va. 161; Maxon v. Gates, 118 Wis. 238, 95 N. W. 92; D. & T. S. L. R. Co. v. Hall, 136 Mich. 302, 94 N. W. 1066.

21—Williams v. Breitung, 216 Ill. 299, 76 N. E. 1060.

22—In re Jenks, 129 Iowa 139, 105 N. W. 396.

23—Darnell v. Lafonte, 113 Mo. App. 282, 89 S. W. 784.

24—Keplar v. Reinhart, 162 Ind. 504, 70 N. E. 806; Evansville Ry. v. Terre Haute, 161 Ind. 26, 67 N. E. 86; McGaugh v. Holiday, — Ala. —, 37 So. 935; Cooley v. Penn. R., 81 N. Y. Sup. 692;

in its origin, it is held that all the requirements of the statute, in order to secure and perfect an appeal, must be strictly complied with.[25]

§ 296. Preparation for Appeal. To successfully prosecute an appeal it is necessary that the party appealing should have laid a foundation for such action, or, in other words, should have the errors complained of appear in the record clearly and distinctly. There may be errors omitted in the trial of the case which cannot be brought up for review on appeal, mainly for the reason that there is nothing appearing in the record to show such errors.

Care should be taken to make the objections offered as specific as possible and also to have the ruling of the court upon such objections appear. A decision of some sort must be secured from the court upon the objections, motions, or requests, or, if there is a refusal to decide, it must be shown that such refusal was wrong. It can hardly be said that the court wrongfully refused to decide, unless the matter was brought to the attention of the court in the proper manner.[26]

The ruling upon the objection complained of, in order to constitute a valid ground of complaint, must have been interposed by the complaining party.[27]

It is further necessary that the objection should be followed by an exception to the ruling of the court thereon, when adverse. An exception is, in reality, a formal notice or statement, indicating that the party intends to abide by his objection and to present the question to an appellate court for review.[28]

The objection must call forth and secure a decision or ruling and the exception must then follow, or, as a rule, it will be unavailing on appeal.

§ 297. Jurisdiction. Matters which are merely discretionary and not final in the case, are held not appealable. Thus, it has been held that a motion to vacate a verdict is not appeal-

Capaul v. Ry., 26 Ohio C. C. 578; Carr v. Miner, 40 Ill. 33; City of Dvpt. v. The D. & St. P. R. Co., 37 Iowa 624.

25—Ark. Ry. v. Powell, 104 Mo. App. 362, 80 S. W. 336.

26—Gilbert v. Hall, 115 Ind. 549, 18 N. E. 28.

27—Carr v. Boone, 108 Ind. 241, 9 N. E. 110.

28—Johnson v. McCullough, 89 Ind. 270; Hull v. Louth, 109 Ind. 315, 10 N. E. 270; Augusta Co. v. Andrews, 89 Ga. 653, 16 S. E. 203; State v. Cent. R. Co., 17 Nev. 259, 30 Pac. 887.

able.[29] The character, value, or subject matter of the action determines whether or not a case is appealable and according to the circumstances, a case may either go to the intermediate or highest court. Consent of parties will not confer jurisdiction upon the appellate courts,[30] and an appeal from the court which had no jurisdiction over the case will confer no jurisdiction upon the appellate court.[31]

It is held competent for parties or their attorneys to stipulate even in advance of the trial, that there will be no appeal from the judgment rendered and such agreements have been held binding and not against public policy.[32]

A default judgment can not be appealed from,[33] nor is a judgment by consent appealable.[34] To be appealable the merits of the case must be involved. Thus, it is held that mere irregularities, as, for instance, a refusal to quash the array of jurors, are not appealable.[35]

§ 298. Default and Satisfied Judgments not Appealable. Default judgment cannot be appealed from,[36] although, where the default occurred by reason of defective service of process and appellant shows by affidavit the failure to serve the summons, an appeal may be allowed on default.[37] Nor can judgment by default be appealed from by consent,[38] but the fact that defendant confesses judgment would not operate to bar another interested person from appealing in the proper instance.[39]

In order to be appealable the merits of the case must be involved and mere irregularity, as, for instance, the refusal of the court to quash the array of jurors, is held not to be appealable.[40]

29—Stern v. Bensington, — Md. —, 60 Am. Dec. 17.

30—Middler v. Lose, 91 N. Y. 148.

31—Ch. R. Co. v. Salem, 162 Ind. 428, 70 N. E. 530; City Windsor v. Clev. R., 105 Ill. App. 546.

32—Hoste v. Dalton, 137 Mich. 522, 100 N. W. 750; Lehy v. Stone, 115 Ill. App. 138.

33—Hill v. Martin, 88 N. Y. Sup. 708.

34—King v. King, 215 Ill. 110, 74 N. E. 89; Weber v. Costigan, 139 Mich. 146, 102 N. W. 666.

35—Rhodes v. S. R. C., 68 S. C. 494, 47 S. E. 689.

36—Cataline v. N. B. & M. Co., 99 N. Y. Sup. 524; Hill v. Martin, 88 N. Y. Sup. 708.

37—King v. King, 215 Ill. 110, 74 N. E. 89; Weber v. Costigan, 139 Mich. 146, 102 N. W. 666.

38—Rhodes v. So. Ry. Co., 68 S. C. 494, 47 S. E. 689.

39—*In re* Black's Estate, 32 Mont. 51, 79 Pac. 554.

40—St. Louis v. Nelson, 108 Mo. App. 210, 83 S. W. 271.

A satisfied judgment cannot be appealed from.[41] A party cannot accept the benefits of a judgment and also appeal therefrom, but where a party has received part of a fund to which he is absolutely entitled, he may properly appeal from a judgment awarding part or balance of the fund if it is awarded to another;[42] and, where the judgment is severable, a part may be appealed from, although the other part may be acquiesced in.[43]

§ 299. Grounds for Reversal. Where a judgment was given against a person over whom the trial court had no jurisdiction it will be reversed,[44] so, also, where no jurisdiction is acquired of a party, necessary to the appeal, it will be ground for reversal;[45] where the trial court had no jurisdiction of the subject matter, it too, will be ground for reversal.[46]

Where it appears that a judgment was granted, without fault of the party aggrieved and there having been prejudicial error, the cause will be reversed.[47] Even where it appears that there is no error but that injustice has been done, the court will reverse the judgment.[48] Wherever it appears that the evidence does not sustain the judgment, the same will be reversed and remanded; for the improper admission of testimony,[49] also the exclusion of proper testimony;[50] also giving erroneous instructions;[51] and where the judgment is in ex-

41—Ziadi v. I. St. R., 97 N. Y. 137, 89 N. Y. Sup. 606.

42—A party who has accepted benefits of a judgment or decree is precluded from appealing therefrom. N. Y. S. Co. v. Thurmond, 186 Mo. 410, 85 S. W. 333. The fact that he may have received, or been paid money on his judgment in the belief that it would not affect his right of appeal is not material.

43—M. B. L. v. Simpson, 163 Ind. 10, 71 N. E. 31.

44—Houghton v. Tibbetts, 126 Cal. 57, 58 Pac. 318; Sullivan v. La Crosse S. P. Co., 10 Minn. 386; Choate v. Spencer, 13 Mont. 127, 32 Pac. 651; McCoy v. McCoy, 9 W. Va. 443.

45—McCoy v. McCoy, *supra.*

46—Harper v. Montgomery, 5 Litt (Ky.) 347; Armstrong v. Hagerstown, 32 Md. 54; Lindsay v. Kan C. R. Co., 36 Mo. App. 51; People v. Ferris, 34 How. Pr. (N. Y.) 189.

47—McArthur v. Starrett, 42 Me. 345.

48—Curley v. Tomlinson, 5 Daly (N. Y.) 283.

49—Armstrong v. High, 106 Ga. 508, 32 S. E. 590; Clapp v. Engledon, 72 Tex. 252, 10 S. W. 462; Doty v. Moore, 16 Tex. 591.

50—Armstrong v. High, *supra;* McClure v. Mo. R., etc., R. Co., 9 Kan. 373; Bascom v. Smith, 31 N. Y. 595.

51—Hures v. Traultham, 27 Ala. 359; Nolen v. Palmer, 24 Ala. 391; Morgan v. Taylor, 55 Ga. 224; Potts v. House, 6 Ga. 324; Doyle v

cess of the amount demanded by plaintiff[52] will all be grounds for reversal.

§ 300. Necessity of Making Exceptions. Exceptions must be made at the right time[53] and in accordance with the rules of the court.[54] Objections to instructions will not be considered unless exceptions thereto were taken in the lower court,[55] nor, in fact, will errors, not assigned on a motion for a new trial.[56]

Instructions which are erroneous in form should be specifically excepted to.[57] Thus it was held that special exceptions must be taken to an instruction which assumed a controverted fact.[58]

The exception to the charges should show the errors complained of,[59] and on a refusal to give instructions no error can be predicated where no special reason for the giving of the same are pointed out.[60]

The party does not waive exceptions made to erroneous charges by reason of the fact that no request is made by him for a proper one.[61] And, it is not necessary to make an exception to the reasons given by the court in refusing an instruction.[62]

§ 301. Bills of Exception. Bills of exception were first introduced into the English practice by the statute of Westminster,[63] whereby the judge signing the bill was required to come into the appellate court and there confess or deny his seal

Kiser, 12 Ind. 474; Newman v. Cincinnati, 18 Ohio 323; Burke v. Ellis, 105 Tenn. 702, 58 S. W. 855.

52—Hall v. Hall, 42 Ind. 585; Stewart v. Tevis, 7 T. B. Mon. (Ky.) 109; Cumming v. Archward, 1 La. Ann. 279; Showles v. Freeman, 81 Mo. 540; Lester v. Barnett, 33 Miss. 584.

53—Chicago Live Stock Co. v. Fix, — Okla. —, 78 Pac. 368.

54—Denver v. Strobridge, 19 Colo. App. 435, 75 Pac. 1076; Doherty v. Ark., etc., R., —Ind. Ter. —, 82 S. W. 899; Metcalf v. Lowenstein, 35 Tex. Civ. App. 119, 81 S. W. 362.

55—Wonderhast Brew. Co. v. Amrhine, 98 Md. 406, 56 Atl. 833; Morisette v. Can. Pac. R., 76 Vt. 267, 56 Atl. 1102; Quinn v. Baldwin Star C., 19 Colo. App. 497, 76 Pac. 552.

56—Kehl v. Warren, 210 Ill. 218, 71 N. E. 347.

57—Davis v. Richardson, 76 Ark. 348, 89 S. W. 318.

58—McElvaney v. Smith, 76 Ark. 468, 88 S. W. 981.

59—Penn v. Trompen, — Neb. —, 100 N. W. 312.

60—Miller v. John, 208 Ill. 173, 70 N. E. 747.

61—Biff v. Mo. R. Co., — Tex. Civ. App. —, 84 S. W. 663.

62—Chessman v. Hale, 31 Mont. 577, 79 Pac. 254.

63—13 Edw. 1, chap. 3.

to the bill; this was later simplified by statute. Bill of exception must show upon its face that the exception was taken at the time, and the bill signed, sealed and filed during the term. But, to meet the varying exigencies and for the convenience of bench and bar, the practice early obtained of allowing time in which to present the bill of exceptions by an order entered of record in the cause, or by written stipulation of parties filed in the case, and the time thus allowed often extended beyond the term, and the correctness of this practice has been repeatedly sanctioned by the court.[64]

To bring before the court for review, these exceptions taken upon the adverse rulings of the court against the objections of the appealing party, it was necessary in order that such matters might be understood, to reduce them to the form of a bill of exceptions. In the absence of any rules of court or statutory provisions the general doctrines of the common law prevail in all of the state and federal courts, excepting, perhaps, those states in which the civil law prevails.[65]

§ 302. Office and Purpose of Bill of Exception. The object of a bill of exceptions is to preserve and make part of the record such matters as transpired in the progress of the trial that otherwise would not become a part thereof.[66] Matters that are properly constituent parts of the record proper, should not be brought into the bill of exceptions as it is not designed to take the place of any part of the record.[67]

The pleadings, rulings thereon, motions, verdicts, and the judgment, are parts of the record and do not require, nor should they be incorporated, into the bill of exceptions.[68]

In order to determine whether or not a bill of exceptions is required, the records should be examined to see whether or not the errors complained of appear therein, and if so, a bill of exceptions is unnecessary.

64—Evans v. Fisher, 5 Gilm. 53; Burst v. Wayne, 13 Ill. 664; Brownfield v. Brownfield, 58 *id.* 152; Goodrich v. Cook, 81 *id.* 4; Hake v. Strubel, 121 Ill. 321-326, 12 N. E. 676.

65—Van Stone v. Mfg. Co., 142 U. S. 128; Chateaugay Co., petitioner, 128 U. S. 544, citing Whalen v. Sheridan, 18 Blatchford 324.

66—Van Stone v. Mfg. Co., 142 U. S. 128; Chateaugay Co., petitioner, 128 U. S. 544, citing Whalen v. Sheridan, 18 Blatchford 324; Bronson v. Schulten, 104 U. S. 410; Whiting v. Fuller, 22 Ill. 33.

67—Brown v. State, 29 Fla. 494.

68—McKey v. Montana, etc., Co., 13 Mont. 15, 31 Pac. 999.

§ 303. Preparation, Signing and Sealing Bills of Exception. The preparation of the bill of exceptions is mere clerical work, nor is the form of great importance. As the supreme court of the United States said: "Whatever brings upon the record properly verified, by the attestation of the judge, matters of fact occuring at the trial on which the point of law arises, which enters into the ruling and decision of the court, excepted to, answers sufficiently the proper description of a bill of exceptions."[69]

The settling and allowance, signing and sealing, a bill of exceptions, under the law, considered as a single act, is, in its nature, both judicial and ministerial. It is judicial in this, that the trial judge must adjudge whether the bill presented is under the law, a proper bill for him to sign; while the mere act of signing and sealing a bill after the judicial act of settling and allowing it has been performed by the judge, is purely ministerial,[70] and mandamus will lie to compel a judge to settle and sign a properly presented bill of exceptions presented within the proper time.[71]

The time for tendering a bill of exceptions is in theory held to be at the very time such exceptions are taken. This, however, has not been considered essential or practical. It is generally held that the bill may be tendered at any time during the term of court when the ruling took place.[72]

Whether or not these exceptions should be reduced to writing and time allowed by the court for this purpose is a matter largely of statutory regulation. Generally, the court has the right and discretion to allow this.[73]

§ 304. Extending Time For Settling Bill of Exceptions. An order extending the time for the settling of the bill of exceptions seems under the greater weight of authority to be required to be made during the term at which the case was tried and the ruling complained of, occurred. And, when not then made, the bill cannot afterwards be allowed.

The bill itself, is, of course, deemed the act of the judge and

69—Kleinschmidt v. McAndrews, 117 U. S. 282.

70—Emerson v. Clark, 2 Scam. 489; People v. Pearson, 2 Scam. 189; Dent v. Davison, 52 Ill. 109; Hake v. Strubel, 121 Ill. 321, 329, 12 N. E. 676.

71—State v. Kelly, 94 Minn. 407, 103 N. W. 15; Cadillac State Bank v. Wexford Circuit Judge, 139 Mich. 126, 102 N. W. 667.

72—Croft v. Ferrall, 21 Ala. 351; Armstrong v. Mock, 17 Ill. 166; U. S. v. Carey, 110 U. S. 51.

73—Goodwin v. Smith, 72 Ind. 113; Bank v. Bartlett, 8 Neb. 398.

must be attested by him, or what is known as the act of settling the bill of exceptions. The bill must be settled and approved by the judge who tried the case. This act cannot be delegated or performed by another, excepting where so provided by statute, as in cases where the death or absence of the judge, or where it is impossible to have him act thereon.[74] The making of the order allowing appeal and fixing the amount of the bond, and the time in which the bond and bill of exceptions in the cause shall be presented and filed, is a judicial act, which can only be performed by the judge in term time, and when sitting as a court. A letter written by the trial judge during vacation, to the appellant's attorney extending the time for presenting the bill of exceptions and authorizing another judge to note the extension on the judge's docket, is held invalid.[75]

Where a bill of exceptions is not presented to the judge, nor settled and allowed by him, and filed within the time fixed in the order, the act of settling and allowing the bill is then a nullity and the matters contained in such bill do not become a part of the record; and where this appears affirmatively from the record, advantage may be taken thereof by motion to strike the bill from the record.[76]

This is so even though a stipulation of record has been entered into after the term or time fixed in the order has expired.[77]

§ 305. Amending Bill of Exceptions. Bills of exceptions under the common law are required to be complete at the time when the judge signs the same.[78] It is held that the bill of exceptions properly allowed duly attested and filed, can not afterwards be disputed. It imports absolute verity.[79] It may, however, be amended or corrected by the court that allowed the bill. But the parties cannot incorporate new matter in the bill, under the cloak of a correction.[80] Not only must the party desiring a correction make a clear showing, but it must

74—McCoy v. Able, 131 Ind. 417, 31 N. E. 453; People v. Anthony, 129 Ill. 218, 21 N. E. 780.

75—Hake v. Strubel, 121 Ill. 321, 12 N. E. 676.

76—Magill v. Brown, 98 Ill. 235; Hake v. Strubel, 121 Ill. 321.

77—*Ibid.*

78—Mills v. Simmons, 10 Ind. 464.

79—Thomas, etc., Co. v. Beville, 100 Ind. 309; Fisher v. Fisher, 131 Ind. 462, 29 N. E. 31; Davis v. Kleine, 96 Mo. 401, 9 S. W. 724.

80—Martin v. St. L., etc., Co., 53 Ark. 250, 13 S. W. 765.

appear that the error or imperfection did not occur through his own negligence or fault.[81]

Amendment to the bill of exceptions made by appellee is held a waiver of irregularities in taking appeal on the part of the appellant.[82]

§ 306. Parties Joining in Exceptions. The rule that parties cannot avail themselves of any objection other than those offered by themselves, does not preclude them from joining, however, where their interests are mutual or joint. This is merely designed to preclude a party from taking advantage of his adversary's objections.[83]

Where the interests of the parties are not joined it is held that separate exceptions must be made.[84]

§ 307. Record to Contain all the Evidence. In order to consider an assignment of error in giving or refusing instructions, it is generally held that the record must contain all the evidence,[85] and this rule applies where the error complained of is as to the court's ruling in directing a verdict.[86]

In Illinois it has been held that errors can be assigned, although the bill of exceptions does not purport to contain all the evidence in the case,[87] but in determining whether there was any error in giving or refusing an instruction to return a certain verdict, it has been held that the bill of exceptions must show that all of the evidence has been set forth.[88]

It is proper to refuse certain instructions asked by appellant where the bill of exceptions fails to set forth any evidence which is applicable,[89] but where the instruction is erroneous

81—Rogers v. Roberts, 88 Ga. 150, 13 S. E. 962; Roblin v. Yaggy, 35 Ill. App. 537.

82—Cooley v. P. R. Co., 81 N. Y. Sup. 692.

83—Soper v. Manning, 158 Mass. 381, 33 N. E. 516; Walter v. Walter, 117 Ind. 247, 20 N. E. 148; Carroll v. Little, 73 Wis. 52, 40 N. W. 582; Turner v. People, 33 Mich. 363.

84—Bosley v. Nat. Co., 123 N. Y. 550, 25 N. E. 990.

85—Citizens' Bank & S. Co. v. Spencer, 46 Fla. 255, 35 So. 73; Ross v. Ry., — Ala. —, 39 So. 583.

86—Marvin v. Bowlby, 135 Mich. 640, 98 N. W. 399; Kitzman v. Kitzman, 115 Iowa 227, 88 N. W. 341.

87—Regan v. McCarthy, 119 Ill. App. 578.

88—Rockwell v. Capital Tr. Co., 25 App. D. C. 98.

89—Crandell v. Classen, 25 App. D. C. 5; Geroldman v. C. G. W. Ry. 108 Iowa 177, 78 N. W. 855; Martin v. Curtis, 119 Mich. 169, 77 N. W. 690; Wright v. Griffey, 146 Ill. 394, 34 N. E. 941;

under any and every condition, such instruction may be reviewed whether the evidence appears or not.[90] The rule seems to be in some states that the record should show so much of the evidence as is necessary to determine the correctness of the rulings of the court in giving or refusing of instructions.[91]

There is no presumption that any evidence was produced which does not appear in the record, which is applicable to and supports instructions,[92] and where the evidence is not given it cannot be presumed that an instruction was unnecessary or incorrect,[93] the rule being that a general exception only raises the question of the correctness of the instruction as embodying the correct proposition of law and not that sufficient evidence was produced to support it.[94] Evidence will not be reviewed where the bill of exceptions does not contain a certificate that it contains it all.[95]

If the transcript or brief is not filed within the time limited by the rules of the supreme court, a motion to dismiss the appeal for such failure will be granted,[96] and where alleged errors are not properly identified or referred to and are not discussed in the briefs, they will not be considered.[97]

§ 308. Assignment of Errors. Except perhaps in actions *de novo,* no question will be considered by the supreme court

Frost v. Grizzely Bluff Cream Co., 102 Cal. 525, 36 Pac. 929.

90—Frost v. Grizzely Bluff Cream Co., *supra.*

91—Parsons v. Parsons, 66 Iowa 754, 21 N. W. 570; Saunders v. Claudd, 117 Mich. 130, 75 N. W. 295; Sidwell v. Lobley, 27 Ill. 438; Roberts v. McGraw, 38 Wis. 52.

92—Lawler v. Norris, 28 Ala. 675.

93—Bowman v. Ware, 18 La. 597.

94—Perrins v. Serrell, 30 N. J. L. 454; Gardner v. Peaslee, 143 Mass. 382, 9 N. E. 833; Soper v. Hall, 22 Neb. 168; Harris v. Prya, 18 N. Y. Sup. 128, 44 N. Y. St. 495; Alexander v. Alexander, 71 Ala. 295; Stone v. Pennock, 31 Mo. App. 544.

95—Lombard v. Holdman, 115 Ill. App. 458; Mayer v. Hornburger, 88 N. Y. Sup. 966. "No case brought to the Supreme Court by appeal or on error shall be placed on the court docket for hearing unless the record is filed within the time now prescribed by law, or within the further time allowed by the court for filing the record, except in extraordinary cases, the court, upon special application may order a cause to be placed on the hearing docket."—Rule 10, Ill. Sup. Court.

96—Moultrie v. Tarpio, 147 Cal. 376, 81 Pac. 1073; Puckhaber v. Henry, 147 Cal. 424, 81 Pac. 1105; Brownlee v. Reiner, 147 Cal. 641, 82 Pac. 324; Garcia v. Brown, 146 Cal. 68, 79 Pac. 590; Coats v. Coats, 146 Cal. 443, 80 Pac. 694.

97—Bird v. Potter, 146 Cal. 286, 79 Pac. 970.

unless pointed out by the assignment of errors. These need not follow any stated form, but should clearly and specifically indicate the errors complained of, and where several points are relied upon, they must be separately stated. The supreme court considers only such errors as are assigned, and is under obligation to decide upon those stated,[98] nor can errors be considered, although raised in the argument, unless they be assigned.

In equitable actions an assignment of error is not considered essential.[99] Where, however, the equitable action is not tried *de novo,* assignments of error may be received as in an action at law.[100] A general assignment of error will not be considered,[1] such as stating "that the court erred in rendering judgment on the verdict" or "that the verdict is contrary to law."[2] The assignment of error should point out the particular ruling objected to, the name of the witnesses if any, and the page of abstracts, where found.[3]

Where a party complains of an instruction the court will not determine whether it states a correct principle of law or not, unless a specific assignment of error is made.[4] Where an instruction includes different and independent subjects, a general exception thereto cannot be considered unless it is incorrect as a whole.[5]

§ 309. Record Should Contain Instructions. It is almost a universal rule that in order to complain or assign as error the giving or refusal of an instruction, the entire charge of the trial court should appear in the record.[6] Instructions which

98—Code Iowa 1897, Sec. 4136; Roberts v. Cass, 27 Iowa 285; Wood v. Whitton, 66 Iowa 295, 19 N. W. 907.

99—Clearfield Bank v. Olin, 112 Iowa 476, 84 N. W. 508; Clark v. Raymond, 84 Iowa 251, 50 N. W. 1068.

100—Schmelz v. Schmelz, 52 Iowa 512, 3 N. W. 526; Reed v. Larrison, 77 Iowa 399, 42 N. W. 333.

1—Casey v. Ballou B. Co., 98 Ia. 107, 67 N. W. 98.

2—Hamilton Buggy Co. v. Iowa Buggy Co., 88 Iowa 364, 55 N. W. 364.

3—Monattys v. Scott, 106 Iowa 203, 76 N. W. 717.

4—Mulhern v. Kennedy, 120 Ga. 1080, 48 S. E. 437.

5—Matthews v. Daley W. M. Co., 27 Utah 193, 75 Pac. 722.

6—Traeger v. Jackson C. Co., 142 Ind. 164, 40 N. E. 907; Kreuger v. Sylvester, 100 Iowa 647, 69 N. W. 1059; Dann v. Cudney, 13 Mich. 239; Bean v. Green, 330 O. St. 444; Holland v. U. Co., 68 Iowa 56, 25 N. W. 927; Germantown v. Goodner, 56 Ill. App. 598; Thomas v. Parker, 69 Ga. 283; C. & E. I. Ry. v. Jones, 161 Ill. 47, 43 N. E. 613, Ritchie v. Schenck, 7 Kan. 170;

have been requested and refused and which have not been set out in the record, bill of exceptions[7] or abstract[8] will generally not be considered. This is especially true where the error complained of is of such a nature that it might be cured by another instruction,[9] the presumption being that the instructions omitted qualify the one objected to.[10]

In order that instructions might be properly reviewed the

Blades v. Robbins, 9 Ky. L. R. 197.

It is necessary to either set out the instructions complained of or a succinct statement thereof, or they will not be considered. Woodward v. Dobyzkoski, 34 Ind. App. 658, 73 N. E. 607; Perdue v. Gill, 35 Ind. App. 99, 73 N. E. 841; Chicago Term. T. R. Co. v. Vandenburg, 164 Ind. 470, 73 N. E. 990; Garrigue v. Keller, 164 Ill. 676, 74 N. E. 523; Buelna v. Ryan, 139 Cal. 630, 73 Pac. 466; Dornbrook v. Rumely Co., 120 Wis. 36, 97 N. W. 493; City of Pueblo v. Froney, 18 Colo. App. 351, 71 Pac. 893; Baker v. Gowland, — Ind. App. —, 76 N. E. 1027; Gumaer v. White Pine Lumber Co., 11 Idaho 591, 83 Pac. 771; State v. Kirkpatrick, — Ia. —, 105 N. W. 121; Grantz v. Deadwood, — S. D. —, 107 N. W. 832.

7—Chambers v. Milner Coal & R. Co., 143 Ala. 142, 39 So. 170; Hartin Co. Min. Co. v. Pelt, 176 Ark. 177, 88 S. W. 929.

8—Shorter Univ. v. Franklin Bros., 75 Ark. 571, 88 S. W. 587.

9—Pittsburg, etc., Ry. Co. v. Smith, 207 Ill. 486, 69 N. E. 873; Van Vleve v. Clark, 118 Ind. 61, 20 N. E. 527; Ill. Cent. Ry. v. Sanders, 58 Ill. App. 117; Roodhouse v. Christian, 158 Ill. 137, 41 N. E. 748; Dann v. Cudney, 13 Mich. 239; Krueger v. Sylvester, 100 Iowa 647, 69 N. W. 1059.

Stating the legal effect of an instruction held insufficient, in Buehner Chair Co. v. Feulner, 164 Ind. 368, 73 N. E. 816, and the omission can not be supplied in the reply brief. C. & E. R. Co. v. Rain, — Ind. App. —, 72 N. E. 539.

10—Hanson v. Stinehoff, 139 Cal. 169, 72 Pac. 913; Milwaukee Har. Co. v. Tysnish, 68 Ark. 225, 58 S. W. 252; Halsey v. Darling, 13 Colo. 1, 21 Pac. 913; Maddox v. Morris, 110 Ga. 309, 35 S. E. 170; Ricketts v. Coles, 97 Ind. 602; White v. Jordan, 27 Me. 370.

Requested instructions not shown to have been refused will, if necessary, to support the judgment be presumed to have been given, Donnell v. Jones, 17 Ala. 689, 52 Am. Dec. 194; Seal v. State, 28 Tex. 491; Hood v. Maxwell 1 W. Va. 219.

Where no written instructions were given and none are in the record, the presumption is that proper oral instructions were given, or that by agreement the case was submitted without instructions. Musselman v. Williams, 21 Ky. L. R. 1077 54 S. W. 3.

Where only a portion of the instructions are shown, the presumption is that proper instructions were given as to all other points in the case. Hewey v. Nourse, 54 Me. 256; Tex. R. Co. v. Lowry, 61 Tex. 149; Brabbits v. Ch. R. Co., 38 Wis. 289.

record should also disclose the pleadings,[11] and where the complaint is that the verdict is contrary to the instructions, the same must be set out in the record.[12]

It is necessary in order to consider a failure to instruct, that the request was made; that the trial court made a ruling; and that the complaining party excepted thereto at the proper time.[13] It has been held that the bill of exceptions should show what party objected to the instructions which were given.[14]

The record must also show whether the requested instructions were given or refused, as a failure to show this will be ground for not considering them,[15] and if instructions are given in reference to arguments made by counsel they will not be reviewed unless the records show that counsel so made an argument,[16] and the rule that the instructions must appear in the record applies when the review is on the rulings on motion for a new trial.[17]

§ 310. **Presumption in Favor of Instructions.** If the evidence is not included in the record the instructions will be approved if they are correct and applicable to any evidence that would be admissible under the pleadings,[18] upon the same principle a refused instruction will be presumed to be inap-

11—Anderson v. Kramer, 93 Ind. 170; Joliet St. Ry. v. McCarthy, 42 Ill. App. 49; Holland v. Union Co., 68 Iowa 56, 25 N. W. 927.

12—Howell v. Snyder, 39 Iowa 610; Larkin v. Beattie, 111 Ala. 303; William v. Woodworth Co., 106 Ala. 254, 17 So. 517; Everett v. Collinsville Z. Co., 41 Ill. App. 552.

13—Corrigan v. Conn. F. Ins. Co., 122 Mass. 298; Neufield v. Radiminski, 41 Ill. App. 144; Morris v. Morris, 119 Ind. 341, 21 N. E. 918; German Ins. Co. v. Stiner — Neb. —, 96 N. W. 122; Foxworth v. Crown, 114 Ala. 291, 21 So. 413; Spant v. Reilly, 15 N. Y. App. Div. 190, 44 N. Y. Sup. 238; Aukland v. Lawrence, 19 Col. 291, 74 Pac. 794.

14—Martin v. C. & M. Elect. Ry. Co., 220 Ill. 97, 77 N. E. 86.

15—Texas Cotton Prod. Co. v. Deney Bros., — Tex. Civ. App. —, 78 S. W. 557.

16—North Chicago St. R. Co. v. Wellner, 206 Ill. 272, 69 N. E. 6.

17—Baggett v. Savannah, Ft. W. R. Co., 41 Fla. 673, 27 So. 1024.

18—Mankin v. Pa. Co., 160 Ind. 447, 67 N. E. 229; Ball v. Marquis, 122 Iowa 665, 98 N. W. 496; Granberry v. Mussman, — Tex. Civ. App. —, 90 S. W. 533; Guyer v. Snow, — Tex. Civ. App. —, 90 S. W. 71; Neal v. Randall, 100 Me. 574, 62 Atl. 706; Grantz v. Deadwood, — S. D. —, 107 N. W. 832.

plicable to the evidence.[19] The burden is on the appellant to show that the evidence did not justify the instruction complained of, as the presumption is in favor of the correctness of the instruction.[20]

§ 311. Conflicting Instructions. Where conflicting instructions are asked a party can not complain of the refusal of the trial court to give one of them.[21] Where conflicting instructions are requested party can not complain of the action of the trial court in modifying them for the purpose of reconciling them,[22] or, where the instructions requested are erroneous.[23]

But where the court modifies the instruction asked by the appellant it is held that the modification may be complained of on appeal where the same is erroneous.[24]

§ 312. Instructions Based on Former Decisions. Instructions which are given in accordance with the decision rendered on a former appeal in the same case will not be re-examined upon a subsequent appeal,[25] but instructions based on principles which were not considered on a former appeal may be examined on a subsequent appeal.[26]

§ 313. Instructions Must be Prejudicial to be Complained of. Instructions complained of are not sufficient grounds for reversal unless prejudice resulted to the party complaining by reason of these instructions.[27] Where instructions are such as will not mislead a jury, a new trial will not be awarded.[28] Where an erroneous instruction is given and was not prejudicial to the party complaining the case will not be reversed.[29]

Where instruction is complained of as error, party must

19—Diamond Bl. C. Co. v. Cuthbertson, — Ind. App. —, 67 N. E. 558.

20—Flinn v. Crooks, — Colo. App. —, 83 Pac. 812.

21—Mo. Pac. R. v. Fox Co., 60 Neb. 531, 83 N. W. 744; Clark v. Pearson, 83 Ill. App. 310.

22—Funk v. Babbitt, 156 Ill. 408, 41 N. E. 166.

23—C. & A. Ry. v. Tracy, 109 Ill. App. 563.

24—Norfolk R. C. v. Mann, 99 Va. 18, 37 S. E. 849.

25—Evansville v. Schachenn, — Ind. App. —, 59 N. E. 863; Kuhn v. DeC., etc., R. 92 Hun 74, 36 N. Y. Sup. 339, 71 N. Y. St. 233.

26—N. Y. L. I. Co. v. Clemmit, 77 Va. 336.

27—Chgo U. T. Co. v. O'Brien, 117 Ill. App. 183.

28—Elkins v. Metcalf, 116 Ill. App. 29.

29—Reuss v. Monroe, 115 Ill. App. 10.

show that the same was prejudicial to him,[30] and affected the merits of the case.[31]

Nor will a party be permitted to complain of error in instruction where the same was given from consideration of incompetent evidence offered by him.[32]

In Hill v. Nicholls, Alabama, it was held, "nor will appellant be allowed to claim that an instruction was erroneous because of the want of proof on a point covered by the instruction when a defect in the evidence was caused by an exclusion had at his instance. The appellant can not complain of an instruction given as to the rule of damages when same was given at his instance."[33] Thus it was held in a case that where a referee makes a ruling at defendant's request, adopting a rule for measuring damages, the defendant can not on appeal challenge its correctness.

Where the court and parties assumed that certain facts existed the appellant can not complain.[34] A party can not complain of inaccurate instructions where the verdict shows that even if the jury considered the instruction corrected the result would be the same.[35]

§ 314. Favorable Instructions or Those Requested Can Not be Complained of. An instruction which is more favorable to the appellant than his pleadings would authorize, can not be taken advantage of or assigned as error.[36] The submission of an issue which the uncontroverted evidence showed to be a fact is not prejudicial to the party to whom such submission was favorable.[37]

So, also, where certain defenses set up by the opponent

30—Doherty v. Arkansas R. R. Co., — Ind. Ter. —, 82 S. W. 899; Byer v. Herman, 173 Mo. 295, 73 S. W. 164.

31—McKinstry v. St. Louis Transit Co., 108 Mo. App. 12, 87 S. W. 1108.

32—Phoenix I. Co. v. Wilcox & Co., 65 Fed. Rep. 724; Hill v. Nicholls, 50 Ala. 336.

33—Vail v. Reynolds, 42 Hun (N. Y.) 647; Andrews v. Ch. R. A., 86 Iowa 677, 53 N. W. 399.

34—Van Rennselaer v. Mould, 77 Hun (N. Y.), 553, 60 N. Y. St. 394.

35—Prather v. Ch. S. R. Co., 221 Ill. 191 (198), 77 N. E. 430.

36—McAfee v. Dix, 91 N. Y. S. 464; Stewart v. N. Car. Ry., 136 N. C. 385, 48 S. E. 793; Delaware & H. Co. v. Mitchell, 211 Ill. 379, 71 N. E. 1026; Schimilovits v. Bares, 75 Conn. 714, 55 Atl. 560.

37—Hoar v. Hennessey, 29 Mont. 253, 74 Pac. 452.

are taken from the consideration of the jury by the instructions, the appellant will have no reason for complaint.[38]

An appellant or plaintiff in error cannot complain of instructions which are given at his own request by the trial court,[39] neither can he complain of an instruction given at the request of his opponent where he has requested a similar or substantially similar instruction;[40] and this is true even though his instructions were refused[41] or erroneous.[42]

An instruction modified by the court at the appellant's own request would come under the same rule that an appellant cannot complain of error in the instructions asked by himself.[43] Instructions expressly recognized as correct when given cannot be urged as error.[44]

A party is estopped from urging objection where instruc-

38—Central Tex., etc., R. Co. v. Gibson, 35 Tex. Civ. App. 66, 79 S. W. 351; Vincent v. Willis 26 Ky. L. 842, 82 S. W. 583; York v. Farmers' Bank, 165 Mo. App. 127, 79 S. W. 968; Shippers' Compressed W. H. Co. v. Davidson, 35 Tex. Civ. App. 558, 80 S. W. 1032.

39—Woodworth v. Mills, 61 Wis. 44, 20 N. W. 728; Worley v. Moore, 97 Ind. 15; Duncombe v. Powers, 75 Iowa 185, 39 N. W. 261; Ill. Steel v. Novac, 184 Ill. 501, 56 N. E. 966; Palmer v. Meriden B. Co., 188 Ill. 508, 59 N. E. 247; Continental Ins. Co. v. Horton, 28 Mich. 173; Benson v. Maxwell, 105 Pa. St. 274; McCarvel v. Phenix Ins. Co., 64 Minn. 193, 66 N. W. 367. In Belcher v. Mo., etc., Ry Co., 92 Tex. 593, 50 S. W. 559, it was held that a party is not estopped from asserting error on the ground that instructions were given at his request unless such instructions were written and signed by him.

Gray v. Eschen, 125 Cal. 1, 57 Pac. 585; Denver v. Stein, 25 Colo. 125, 53 Pac. 283; Water Works v. Brown, 8 Kan. App. 725, 50 Pac. 966.

40—Horgan v. Brady, 155 Mo. 659, 56 S. W. 294; Franks v. Matson, 211 Ill. 344, 71 N. E. 1011; St. L., etc., R. Co. v. Baker, 67 Ark. 531, 55 S. W. 941; Taylor v. Warner, — Tex. Civ. App. —, 60 S. W. 442; Phelps v. Salisbury, 161 Mo. 1, 61 S. W. 582; C. C. C. & St. L. v. Alfred, 113 Ill. App. 239; Renner v. Thornburg, 111 Iowa 515, 92 N. W. 950; Phillips v. Wis. St. Ag. Society, 60 Wis. 401, 19 N. W. 377; Egbers v. Egbers, 177 Ill. 82, 50 N. E. 285; Stevens v. Crane, 116 Mo. 408, 22 S. W. 783; Carnwright v. Gray, 127 N. Y. 92, 27 N. E. 835.

41—Citizens' Ry. Co. v. Wash., — Tex. Civ. App. —, 58 S. W. 1042; Davis v. Brown, 67 Mo. 313.

42—Tucker v. Baldwin, 13 Conn. 136, 33 Am. Dec. 384; Egbers v. Egbers, *supra.*

43—Regensburg v. Nassau Elect. Ry. Co., 58 N. Y. App. 566, 69 N. W. 147.

44—Wiley v. Lindley, — Tex. Civ. App. —, 76 S. W. 208.

tion containing similar instruction was given at his request.[45] It is not error to refuse instruction if the substance embodied is in others given,[46] or is identical in principle.[47]

When a party offers several instructions containing the same principle of law he cannot complain if the one refused by the trial court is the one he considers most important.[48]

§ 315. **Erroneous Instruction as Affecting Appeal—Remittitur.** An excessive verdict, which is given on account of an erroneous instruction, may be cured by a remitter, obviating the necessity of a reversal because of the error,[49] and where it appears that under a correct instruction the same conclusion would have resulted, the error of the instruction will not be considered.[50]

An instruction on the question of damages becomes immaterial on a verdict being rendered for defendant on the main issue.[51] Erroneous instructions as a general proposition can only be cured by their withdrawal in proper time and by proper means.[52] The giving of the correct instruction subsequently will not cure an incorrect instruction.[53]

An instruction that it was incumbent on the company to use all reasonable care to prevent injury, would not cure an instruction that a street car company has the paramount right of way.[54] Where the facts in a particular case are close,

45—Franks v. Matson, 211 Ill 346, 71 N. E. 1011.

46—Kibe v. People, 215 Ill. 256, 74 N. E. 146; Chi. City Ry. v. Mattheson, 212 Ill. 299, 72 N. E. 443; Chi. Elec. Trans. Co. v. Kinnare, 115 Ill. App. 115; Chi. U. T. Co. v. Leach, 117 Ill. App. 167, 174.

47—Chi. U. T. Co. v. Jacobson, 217 Ill. 408, 75 N. E. 508.

48—Ind. I. & I. Ry. Co. v. Otstch, 212 Ill. 429, 436, 72 N. E. 815.

49—Hayden v. Florence Swg. Mach. Co., 54 N. Y. 221; Buetzier v. Jones, 85 Iowa 721, 51 N. W. 242; Hartford Dep. Co. v. Calkins, 186 Ill. 104, 57 N. E. 863.

50—Quinn v. Baldwin Star Coal Co., 19 Colo. App. 497, 76 Pac. 552; Conant v. Jones, 120 Ga. 568, 48 S. E. 234.

51—Wilhelm v. Donegan, 43 Cal. 50, 70 Pac. 713; Southern R. Co. v. Oliver, 102 Va. 710, 47 S. E. 862.

52—Evansville, etc., Ry. v. Clements, 32 Ind. App. 658, 70 N. E. 554.

53—Ball v. Dolan, 18 S. D. 558, 101 N. W. 719; Cresler v. Asheville, 134 N. C. 311, 46 S. E. 738; Bertenstein v. Schrack, 31 Ind. App. 200, 67 N. E. 547.

54—Saloman v. Buffalo R. Co., 96 App. Div. 487, 89 N. Y. 99; Texas Midland R. Co. v. Booth, 35 Tex. Civ. App. 322, 80 S. W. 121; Baker v. Independence, 106 Mo. App. 507, 81 S. W. 501.

an incorrect instruction cannot be cured by a correct one subsequently given.[55]

Error in making a city liable for a defective sidewalk, if the defective condition was known before the accident, without requiring it to be known a sufficient length of time to have enabled the city to have it repaired, is not rendered harmless by the fact that the case was tried on the theory of constructive notice.[56]

An inadvertent reference to an outside issue immediately qualified in such manner to destroy its force is not held error. An erroneous instruction that the plaintiff claimed that certain of his injuries were permanent, is cured by an instruction to not allow damages for permanent injuries of any kind.[57]

The refusal of a correct instruction is not cured by referring to the matters in a negative way with which the offered instruction concerns itself, but[58] instructions on the same point may cure other instructions that are incomplete.[59] The refusal to give correct instructions will be deemed harmless where no substantial rights were prejudiced.[60]

An instruction cannot be cured by merely stating that they are to be considered in connection with other instructions.[61] Nor can instructions be cured by subsequent instructions[62] which do not refer thereto.

Where there is a refusal of a corrected instruction the same is cured, it has been held, where the charge as a whole conveys the same idea.[63] As a general rule it may be said that where the jury has not been misled by an erroneous instruction, and no prejudice resulted, it will not be held reversible error,[64] although it has been held that instructions com-

55—In re Knoxville, 123 Iowa 24, 94 N. W. 468.

56—Baker v. Independence, *supra;* McDonald v. Nugent, 122 Iowa 651, 98 N. W. 506; Chi. & C. R. C. v. Appell, 103 Ill. App. 185.

57—S. Kas. R. Co. v. Sager, — Tex. Civ. App. —, 80 S. W. 1038.

58—Allen v. St. L. C., 183 Mo. 396, 81 S. W. 1142.

59—Quinlan v. Kan., 104 Mo. App. 616, 78 S. W. 660.

60—Brown v. St. L. Tr. Co., 108 Mo. App. 310, 78 S. W. 660.

61—Klimpel v. Met. St. R. R. Co., 92 App. Div. 291, 87 N. Y. Sup. 39.

62—Tex. So. R. R. Co. v. Long, 35 Tex. Civ. App. 339, 80 S. W. 114.

63—Monsette v. Can. Pac. Co., 74 Vt. 232, 56 Atl. 1102.

64—Beidler v. King, 209 Ill 302, 70 N. E. 763.

plained of as error on appeal are presumed to have been understood by the jury and to have influenced them.[65]

The showing necessary to evidence the fact that the jury had not been misled would seem to require that the verdict should have been in accordance with the weight of evidence, so that a verdict should have been directed in favor of the party or that the instruction was on an immaterial point and not decisive of the issue.

§ 316. Abstract of Record, What It Should Contain. Abstracts of record should contain all that is necessary for the court to understand the errors complained of.[66] An abstract in the form of a mere index will not be considered by the court,[67] but so much must be contained in the abstract of pleading or of a judgment, as to make the meaning clear to the court.[68]

The names of the parties and nature of the proceedings, as well as testimony or evidence, or so much thereof as to make it intelligible, must always be given, and the evidence will not be reviewed where there has been no effort made in good faith to abbreviate or abstract it, as required.[69]

Although it has been held that the abstract might be criticised as being too full or voluminous, it is not fatal.[70] It has also been held that where an amended abstract is largely a transcript of the testimony by questions and answers at length, the abstract will, on motion, be stricken from the file.[71]

In an Iowa case it was stated in the opinion that the court recognized the necessity and advantage at times to set out the questions and answers as to some particular point, but that the case discussed was not within this necessity.[72]

The general rule may be said to be that although the ap-

65—Conrad v. Cleveland R. Co., 34 Ind. App. 133, 72 N. E. 489.

66—Hickson v. Carqueville Lith. Co., 115 Ill. App. 427.

67—Henlon v. Phol., 130 Ill. App. 100.

68—Metzler v. Crabbin, 20 Col. App. 404, 79 Pac. 301.

69—St. Amand v. Lemand, — Ga. —, 47 S. E. 949. What a good abstract of record should contain, given in Chapin v. Clapp, 29 Ind. 611.

70—N. Y. Store v. Thermond, — Mo. —, 85 S. W. 333.

Abstract not sufficiently condensed, was criticised in Austin v. Bacon, 28 Wis. 416; Butler v. Ry. Co., 28 Wis. 487-493; Southmayd v. I. Co., 47 Wis. 517; Cook v. Ry. Co., 98 Wis. 624, 74 N. W. 561.

71—State v. Hull, 83 Ia. 112, 114, 48 N. W. 917.

72—Vaugh v. Smith, 58 *id.* 553, 12 N. W. 604; Tootle v. Taylor, 64 *id.* 629, 21 N. W. 115.

pellant may be successful, he should not be allowed the full cost of an abstract containing necessary matter, but the court should, in its discretion, apportion the costs between the litigants.[73]

The abstract should be a concise summary of the substance of the record and not a mere reprint.[74] It has been held that an entire disregard of the court rules may affirm the judgment below,[75] or authorize a dismissal.[76] A non-compliance has been held to result in the striking out of the abstract or brief, although the party might obviate this by amending within the specified time.[77] On the other hand it is held that a motion to strike out will not be entertained, but that objecting party should set forth in his abstract or brief the omitted matter and the court will, upon appeal, determine the correctness or genuineness of the abstract or brief.[78]

It is held under the statutory provisions modifying the common law, that matters properly identified by the bill of exceptions are a part thereof.[79] Such instruments must be clearly identified in the bill and the original instruments would not be made a part of the bill by merely attaching them as exhibits.[80] Proposed pleadings or amendments are not a part of the record.[81]

The manner of preparing an abstract of record is usually set forth in the statutes of the various states, or in the rules of the Supreme Court, and these statutes and rules are to be consulted.[82]

73—Chi. & A. R. Co. v. Bell, 209 Ill. 25, 70 N. E. 754; Donahue v. McCosh, 70 Ia. 733-8, 30 N. W. 14; Baldwin v. Foss, 71 Ia. 389, 30 N. W. 389; Chandler v. Fremont Co., 42 *id.* 58; Brown v. Byam, 59 *id.* 52, 12 N. W. 770; McWhirter v. Crawford, 104 *id.* 550; Fox v. Grey, 105 Ia. 433, 75 N. W. 339.

74—McLimans v. Lancaster, 63 Wis. 590, 23 N. W. 689.

75—Long v. Long, 96 Mo. 180, 6 S. W. 766.

76—Heath v. Silverthorn Lead Mining Co., 39 Wis. 146.

77—Arnold v. Chamberlain, 39 S. W. 201, 14 Tex. Civ. App. 634.

78—Singlemeyer v. Wright, 124 Mich. 230, 82 N. W. 887.

79—Stratton v. Kennard, 74 Ind. 302.

80—Chicago, etc., Co. v. Harper, 128 Ill. 384, 21 N. E. 561; Cincinnati, etc., Co. v. Clifford, 113 Ind. 480, 15 N. E. 524.

81—Norman v. Cen. Ky. Asylum, 26 Ky. L. 71, 80 S. W. 781.

82—*Iowa*—"Printed abstracts of the record shall be filed in accordance with rules established by the supreme court, and shall be presumed to contain the record, unless denied or corrected by subsequent abstract. If any denial or abstract is filed without good and

§ 317. Purpose of Abstract—Must be Filed. The purpose of an abstract or a printed case, as it is called in Wisconsin, is to present correctly the material parts of the record for the

sufficient cause, the costs of the same or any part thereof, and of any transcript thereby made necessary, shall be taxed to the party causing the same."—Sec. 4118. Code of Iowa.

Illinois—"In all cases the party bringing a cause into this court shall furnish a complete abstract or abridgment of the record, referring to the pages of the record by numerals on the margin. And where the record contains the evidence, it shall be condensed in narrative form in the abstract, so as to clearly and concisely present its substance. The abstract shall contain a complete index alphabetically arranged giving the page where each paper or exhibit may be found, with the names of the witnesses and the pages of the direct, cross and re-direct examination. Provided, that in cases brought from the appellate court the abstracts filed in such court under its rules may be filed here by changing the cover to conform to the rule, and filing therewith a printed abstract of the record of the appellate court and an index. The abstract must be sufficient to fully present every error and exception relied upon, and it will be taken to be accurate and sufficient for a full understanding of the questions presented for decision, unless the opposite party shall file a further abstract, making necessary corrections or additions. Such further abstract may be filed if the original abstract is incomplete or inaccurate in any substantial part."—Rule 14, Ill. Sup. Court.

"Abstracts and briefs of plaintiff in error or appellant must be filed in the clerk's office on or before the time required for filing the transcript of record, with proof of service of a copy of such abstracts and briefs on the opposite party or his counsel, personally or by mail; and in case either the abstract or brief is not so filed within the time prescribed, the judgment of the court will, on the call of the docket, be affirmed. The defendant in error or appellee shall file his brief, with like proof of service within ten days after the time so fixed for the filing of briefs by appellant or plaintiff in error, unless the time for the filing of the brief of the appellant or plaintiff in error shall have been extended, in which case he shall have ten days from the day on which the brief of appellant or plaintiff in error is actually filed. Appellant or plaintiff in error shall then have five days in which to file a reply brief, at the expiration of which the cause will stand for decision and no further arguments will be received."—Rule 27, Ill. Sup. Court.

Wisconsin—"Hereafter in calendar causes, a case shall be made and printed by the appellant or plaintiff in error, which shall contain a complete abstract or abridgment of so much of the record mentioned in the foregoing rules, as may be necessary to

convenience of the court.[83] The various states usually have statutes or rules of the supreme court on the subject, and where the rules are held to be mandatory an appeal can only be preferred on abstract,[84] and the appellee cannot waive compliance of this rule.[85] Failing to comply with the rule it is generally held that the case will either be affirmed[86] or the appeal dismissed.[87]

§ 318. Abstract Must Show the Objection to be Considered. The abstract should always show the objections made, otherwise the review court will not consider it.[88] So, in an appeal from an order denying a motion for a re-taxation of costs, the record must show what items are objected to and also the grounds of objection;[89] and, in order to obtain a review of an alleged error in instruction, the exception must appear in the record or abstract.[90]

Additional Abstracts. It is not unusual to allow parties to file amended abstract when they discover that their cases were not fully presented in the original abstract. This, of course, is always done before the cause is submitted and at such times as the other parties would not be prejudiced thereby.[91] No leave of court or notice to appellee is generally necessary in order to file an amended abstract,[92] provided the cause has not been submitted, but after the cause has been submitted, as where appellee has argued his case, appellant cannot amend his abstract without leave of court and, if granted at all, will only be on such terms as seem proper under the circumstances.[93]

a full understanding of the questions presented for decision."—Rule 8, Sup. Court Wis.

83—Hay v. Lewis, **39** Wis. 364; Ballard v. Cheney, 19 Neb. 58, 26 N. W. 587; Alexander v. Irwin, 20 Neb. 204, 29 N. W. 385; Payntz v. Reynolds, 37 Fla. 533, 19 So. 649.

84—Habbie v. Andrews, 111 Ala. 176, 19 So. 974; May v. Dyer, 57 Ark. 541, 21 S. W. 1064; Williams v. Nottingham, 27 Ind. 461.

85—Cox. v. Behm, 26 Ind. 307.

86—Jayne v. Wine, 98 Mo. 404, 11 S. W. 969; Liter v. Ozokerite Min. Co., 7 Utah 487, 27 Pac. 690.

87—Mayer v. Helland, 2 Colo. App. 209, 29 Pac. 1135; Gottlieb v. Frost, 6 Colo. App. 452, 41 Pac. 508.

88—Shaw v. Bryan, 39 Mo. App. 523.

89—Thomas v. International Silver Co., 84 N. Y. S. 612.

90—Auckland v. Laurence, 19 Colo. App. 291, 74 Pac. 794.

91—Wells v. B. C. R. & N. R. Co., 56 Ia. 520-2, 9 N. W. 364; Frost v. Parker, 65 Ia. 178-180, 21 N. W. 507.

92—Frost v. Parker, *supra.*

93—*In re* Caywoods Will, 56 Ia. 301-2, 9 N. W. 228; Betts v. City of Glenwood, 52 *id.* 124, 2 N. W. 212; Watson v. Burroughs, 104 *id.* 745, 73 N. W. 866.

Where appellee claims appellant's abstract does not contain all the evidence, he should point it out in an additional abstract.[94] It has been held in Iowa that if it appears the submission of the case was not delayed or that prejudice has resulted the additional abstract will not be stricken from the files, although not filed within the time prescribed by the rules.[95]

§ 319. Abstract Taken as True—Time of Filing Extended. In absence of an additional abstract by appellee the abstract filed by appellant will be regarded as true.[96] This rule holds good where appellee does not appear, especially in so far as it purports to set forth the record.[97]

On application the court may extend the time for filing of abstract, provided the application is made before the time given by the statutes has expired,[98] but in such case notice of the application should be served on the adverse party or his attorney.[99]

§ 320. Briefs Requisite. The courts almost universally require that parties shall file briefs for the information of the court and embody therein the points of law desired to be established, together with the arguments and authorities upon which the contention is based.[100] This cannot be waived by any agreement of the parties.[1] It is also incumbent that counsel for the appellee should file a brief in support of the finding or judgment of the lower court and the correctness of the proceedings therein.[2] Points not raised in the trial court, or specified in the assignment of errors, are not considered by the appellate court, although they may be set forth and discussed in the brief.[3] The brief should contain the authorities

94—Harrison v. C. M. & St. P. Ry. Co., 6 S. D. 100, 60 N. W. 405.

95—Tucker v. Carlson, 113 Ia. 449, 85 N. W. 901; Clark v. Ellsworth, 104 Ia. 442, 73 N. W. 1023; Frank v. Levi, 110 Ia. 267, 81 N. W. 459; Sanders v. O'Callaghan, 111 *id.* 574, 82 N. W. 969; Salvador v. Feeley, 105 *id.* 478, 75 N. W. 476.

96—Van Rees v. Witzenburg, 112 Ia. 30, 83 N. W. 787; Kearney v. Ferguson, 50 *id.* 72; Hardy v. Moore, 62 *id.* 65, 17 N. W. 200.

97—Ruble v. Helm, 57 Ark. 304, 21 S. W. 470; Daniels v. Knight Carpet Co., 15 Colo. 56, 24 Pac. 572.

98—Newbury v. Getchell, etc., Co., 106 Ia. 140, 76 N. W. 514.

99—Newburg v. Getchell, *id.*

100—Haberlau v. L. Sh. Ry., 17 Ill. App. 261.

1—Disse v. Frank, 52 Mo. 551.

2—Chamberlain v. Leslie, 39 Fla. 452, 22 So. 736.

3—Nall v. Wabash Ry., 97 Mo. 68, 10 S. W. 610.

cited in support of the contention and their applicability to the error,[4] and, if the authorities cited in the brief do not support the reasons assigned there can be no sufficient ground for complaint involving the striking of the brief from the files.[5]

§ 321. **Failure to File Brief—Amendments.** Briefs are usually required by the rules of the court and a failure to file a brief has been considered a waiver of the right to be heard,[6] and will result in an affirmance of the judgment[7] or dismissal of the appeal,[8] or at least in a continuance,[9] but a delay of but short time, as of a few hours, has been considered as insufficient to warrant affirmance;[10] and even when the brief was filed a month after the appeal was perfected, though not served for several days afterwards, the court held it not a ground for affirmance.[11] Errors argued for the first time in the reply brief will be disregarded;[12] so also, objections raised for the first time in the supreme court will not be considered;[13] but this rule, however, seems not to apply in criminal cases.[14]

A party has a right to amend his brief to the extent of citing different authorities; it has been held,[15] however, that after the motion attacking the brief for not conforming to the rules has been made, an amendment will not be allowed.[16] A contrary rule, however, seems to obtain in the federal courts.[17]

§ 322. **Contents of Briefs.** As a general rule it may be stated that errors not specifically referred to in the brief, although they may have been included in the assignment of errors in the abstract, will not be noticed by the reviewing

4—Peele v. Provident Fund., 147 Ind. 543, 44 N. E. 66; Kerr v. Smiley, 77 Ill. App. 88.

5—Fishback v. Brammel, 6 Wyo. 293, 44 Pac. 840.

6—Le Breton v. Swartzell, 14 Okla. 521, 78 Pac. 323.

7—Rayner v. Rayner, 77 Ia. 282, 42 N. W. 184.

8—Schulz v. Buederick, — Tex. Civ. App. —, 81 S. W. 384.

9—*In re* Haase, 91 N. Y. Sup. 373.

10—Buesthner v. Creamery Co., — Ia. —, 100 N. W. 345.

11—Wood v. Fisk, 45 Ore. 615, 77 Pac. 198.

12—Fink v. Des Moines, —Ia. —, 80 N. W. 28.

13—Bayne v. Lettisville, 103 Ia. 481, 72 N. W. 693; Eastland v. Summerville, 111 Ia. 164, 82 N. W. 475.

14—State v. Nine, 105 Ia. 131, 74 N. W. 945.

15—Peck v. Peck, — Tex. Civ. App. —, 83 S. W. 257.

16—*Ibid.*

17—The Kawailani, 128 Fed. 979.

court and will be considered as having been waived;[18] and for the same reason evidence bearing on the issue should be set forth where it is complained that the verdict failed to sufficiently find upon the issue.

The mere statement that the court erred without pointing out the error complained of, is in the nature of a conclusion and is insufficient.[19] So also a statement that the judgment is excessive is a mere conclusion.[20] And where it is complained that the hypothetical questions are erroneous in assuming evidence not admitted, it must be pointed out.[21]

The fact that such errors were observed in oral argument before the court does not sufficiently bring the matter before the court where they are not included in the briefs filed.[22] Errors complained of should be specifically designated.[23] It is not the duty of the reviewing court to search for errors. Thus, it is held that the particular evidence, the admission or rejection of which is complained of, should be pointed out or referred to in such a way as to be clearly designated.[24] It is insufficient to merely state that the allegations or the verdict is unsupported by evidence;[25] the very pages in which such evidence is found should be specifically cited.[26]

Instructions which are complained of as erroneous should be set out in the abstract, and where error is complained of in refusing instructions the brief should point out wherein the evidence warrants the giving of such instruction.[27]

The language of the brief should not be disrespectful or abusive, either towards the judge or the parties, and if so, such matter may be stricken out;[28] but it is held that only

18—Roberts v. Wilkinson, 34 Mich. 129; Lewis v. King, 180 Ill. 259, 54 N. E. 330; Ferry v. Nolen, 135 Ind. 80, 34 N. E. 710.

19—Chicago, etc., Ry Co. v. Hunter, 128 Ind. 213, 27 N. E. 477; Chicago v. Spoor, 91 Ill. App. 472.

20—Chicago v. Spoor, 91 Ill. App. 472.

21—Xenia Real Estate Co. v. Dock, 140 Ind. 259, 39 N. E. 870.

22—Dodge v. McMahan 61 Minn. 175, 63 N. W. 487.

23—New Albany Gas Lt. Co. v. New Albany, 139 Ind. 860, 39 N. E. 462; Wirehauser v. Early, 99 Wis. 445, 75 N. W. 80; Joyce v. White, 95 Cal. 336, 30 Pac. 524.

24—Bowman v. Simpson 68 Ind. 229; Gregg v. Kommers, 22 Mont. 511, 57 Pac. 92.

25—Wolverton v. Taylor, 54 Ill. App. 380.

26—Conger v. Dingman, 98 Wis. 417, 74 N. W. 125.

27—Le Roy, etc., Ry. v. Crum, 39 Kan. 642, 18 Pac. 944.

28—Rosenberg v. Stein, 77 Ill. App. 248; Mathews Appeal, 104 Pa. St. 444; Eureka Steam Htg. Co. v. Sloteman, 69 Wis. 398, 34

in extreme cases should the brief be stricken from the files for such reasons.[29]

There is a difficulty arising in the holding of the courts as to the consequences of striking the brief from the file, some courts holding that the appeal would then be dismissed, although it is usual to grant leave for another brief to be filed within a certain time.[30]

§ 323. **Matters Reviewed on Appeal.** Rulings on evidence cannot be considered or reviewed upon appeal unless exceptions thereto were urged in the case,[31] and if evidence is to be reviewed, the bill of exceptions would show that all of the evidence is included therein.[32] However, it is held that where it is clear that the record contains all of the evidence the supreme court will review same on appeal although an express statement to that effect is omitted.[33]

The sufficiency of pleadings will not be reviewed unless the same are included in the record,[34] and where the only exception is that there is no cause of action, it is held sufficient to include the pleading assailed, together with the exception and judgment thereon.[35] For the same reason the overruling of demurrers cannot be considered where the record does not contain any pleadings and the demurrers and rulings thereon are not set forth.

In order to present an alleged error the record must show the ruling complained of, the objection and exception thereto, and so much of the evidence as to make the matter intelligible.

§ 324. **Writ of Error a Supersedeas at Common Law.** The writ of supersedeas is designed to supersede the judgment of law brought up for review by writ of error. It was a writ directed to an officer commanding him to cease from enforcing the execution of the writ which he may have in his hands. It is now used synonymous with the stay of proceedings in the enforcements of judgments.[36]

N. W. 387; Scroggins v. Brown, 14 Ill. App. 338.

29—People v. Parke, 28 Col. 322, 57 Pac. 692.

30—Scroggins v. Brown, 14 Ill. App. 338; Sears v. Starbird, 75 Cal. 91, 16 Pac. 531.

31—Atl. & B. R. C. v. Rabinowitz 120 Ga. 864, 48 S. E. 326; Tex. & P. R. C. v. Birdwell, — Tex. Civ. App. —, 86 S. W. 1067.

32—Grand Lodge I. O. O. F. S. O. I. v. Onstein, 110 Ill. App. 312.

33—Fisher v. C. C. R. Co., 114 Ill. App. 217.

34—Consolidated St. C. v. Staggs, 164 Ind. 331, 73 N. W. 695.

35—Succession of Buque, 112 La. 1046, 136 So. 849.

36—Dulin v. Pac. Woods Co., 98 Cal. 304, 33 Pac. 123.

It is the suspension of the power below on the judgment appealed from, and if a writ of execution has issued upon such judgment, it is a prohibition of the execution of the writ.[37]

Originally a writ of error in common law operated as supersedeas of all proceedings.[38]

Writs of error were made use of to a large extent under the common law for the purpose of delay until various acts of Parliament were passed requiring security to be furnished in order that the writs might have the effect of a stay.[39] So, also, an appeal, as well as a writ of error, operated *per se* as a supersedeas under the former practice in chancery.[40]

For this reason it is generally held that unless a statute provides that some security or bond be given, the appeal or writ of error will in itself be a supersedeas.[41]

The writ of supersedeas was originally a writ directed to an officer commanding him to cease from enforcing the execution of the writ he was about to execute or which might afterwards come into his hands for execution. It is an auxiliary process to suspend the enforcement of the judgment which has been brought up by a writ of error for review, or, in other words, it supersedes the judgment and is used synonymous with a stay of proceedings.

An appeal does not, of itself, suspend or supersede the enforcement of the judgment, per se.[42]

The supersedeas operates to preserve the matter in *status quo* pending the determination of the appeal and suspend all further proceedings therein.[43]

§ 325. **Application for Supersedeas, How and When Granted —Bond for, When Waived, and Exemptions From.** An application for a stay, or supersedeas, should be made by a motion and the applicant must pay the cost of such application. No notice to the adverse party is required of such an application in the absence of statute.[44] The granting of this writ is held

37—Mabray v. Ross, 1 Heisk (Tenn.) 769.

38—Bacon's Abridgment of Supersedes, D. 4.; Hudson v. Smith, 9 Wis. 122; Hotel v. Kountz, 107 U. S. 378.

39—Hudson v. Smith, *supra;* Hotel v. Kountz, *supra.*

40—Hudson v. Smith, *supra;* Hovey v. McDonald, 109 U. S. 150.

41—Hudson v. Smith, *supra.*

42—Hovey v. McDonald, *supra.*

43—Street v. Hiles, 77 Wis. 475, 46 N. W. 810; Hyatt v. Clever, 104 Ia. 338, 73 N. W. 831.

44—Matthew v. Nance, 49 S. C. 389, 27 S. E. 100.

to be a matter for the discretion of the court, and in this view of the case the court may affix such conditions as is considered right and proper to protect the rights of the party.[45]

It is provided in some states that executors, administrators, receivers, trustees and other parties, as well as parties in *forma pauperis*, are exempt from the giving of bond to secure a supersedeas.[46] So, also, is the United States or the state or state board of public works, usually exempt from the giving of such a bond.[47]

It appears that such a bond may be waived by the adverse party, but the mere appearance of counsel for appellee cannot be considered as a waiver of the stay bond.[48]

§ 326. **Separate and Successive Appeals.** Separate and distinct causes of action not consolidated in the trial court cannot be brought up for review by one appeal or writ of error, thus, where separate suits and separate pleadings were filed, but the records show, however, that by agreement the evidence being identical in both cases was heard at the same time on both cases and with the same effect as if heard separately in each case, it was held that both cases could not be incorporated in one transcript and heard together on appeal, as the cases were not actually consolidated in the trial court;[49] neither can the parties by agreement or consent authorize their separate cases to be tried together on appeal,[50] and where an attempt has been made to thus unite two appeals the court should dismiss them for duplicity.[51]

A party who can obtain all the relief to which he is entitled upon one appeal can not be permitted to bring two appeals,[52] although under the statutory system of procedure a party has been held entitled to avail himself of both remedies of appeal and writ of error, and one party to the case may bring a writ of error and the other appeal.[53]

45—Home Fire Ins. Co. v. Dutcher, 48 Neb. 755, 67 N. W. 766; N. Y. Sec. Co. v. Saratoga, etc., Co., 39 N. Y. Sup. 486.

46—Leach v. Jones, 86 N. C. 404; Smith v. Dennison, 94 Ill. 582.

47—Treadway v. Sempill, 28 Cal. 652.

48—Otterbach v. Alexandria Ry. Co., 26 Gratt. (Va.) 940.

49—Roach v. Baker, 145 Ind. 330, 43 N. E. 932.

50—Mohr v. Cochrane, 20 Tex. Civ. App. 183, 49 S. W. 677; Brown v. Spafford, 95 U. S. 474.

51—Ballou v. Chicago, etc., Ry. 53 Wis. 150, 10 N. W. 87.

52—Hopkins v. Hopkins, 39 Wis. 166.

53—Harding v. Larkin, 41 Ill. 413.

On the other hand, it is held that a party cannot split an appeal into fragments and appeal from a part. He may only appeal from the final judgment,[54] but where several judgments are rendered, separate and distinct, there may be appeal from one and not from the other.[55]

It seems that under the statutory system of procedure a party may avail himself of both remedies of appeal and writ of error, one party may appeal and the other bring a writ of error on the same subject.[56] But where a party can obtain all the relief to which he is entitled upon one, he will not be permitted to bring two appeals.[57]

Separate and distinct causes not consolidated in the trial court cannot be brought up for review by one appeal or one writ of error. Thus it was held that where separate suits and separate pleadings were filed, and the record showed, however, that by agreement, the evidence being the same, was heard at the same time on both matters and with the same effect as if found separately in each case, but the cases were not consolidated in the trial court, both cases could not be incorporated in one transcript and heard together on appeal.[58]

So, also, parties cannot authorize their separate cases to be tried together by agreement.[59]

Dismissal of Appeals. The law seems to be well settled that a party may dismiss or withdraw his appeal and begin another within the time limited[60] for taking an appeal. The first appeal should be dismissed if pending, as there can be no second appeal while the first is still in court, without a clear abandonment of the first appeal, and where the first appeal is not dismissed, or the intention so to do clearly evidenced from the second appeal, the courts hold that the second appeal should be dismissed.[61] The beginning of a second ap-

54—Anderson v. Moberly, 46 Mo. 191; McGee v. Tucker, 122 N. C. 186, 29 S. E. 833.

55—Constantine v. Fresh, 17 Tex. Civ. App. 444, 43 S. W. 1045.

56—Harding v. Larkin, 41 Ill. 413.

57—Hopkins v. Hopkins, *supra*.

58—Roach v. Baker, 145 Ind. 330, 43 N. E. 932.

59—Mohn v. Cochrane, *supra;* Brown v. Spafford, *supra*.

60—Johnson v. Jennison, 18 La. Ann. 190; Stutsman v. Sharples, 125 Ia. 335, 101 N. W. 105; Groendike v. Musgrave, 123 Ia. 535, 99 N. W. 144.

61—Newberry v. Getzel *et al.* 106 Ia. 140; 76 N. W. 514; Dormand v. McDonald, 47 Fla. 252, 36 So. 52.

peal will operate only as a dismissal of the first, per se, when the intention is clearly evident.[62]

The proceeding cannot be brought up again for review after a final determination secured upon the first appeal[63] unless some new matter has arisen in the case sufficient to warrant such action.[64]

While an appeal may again be prosecuted in the same case where there has been new proceedings occurring in the case, it is held that this applies only as to points not passed upon in the first instance.[65]

An appeal will be dismissed upon the mere request of the appellant or upon the stipulation of the appellant and appellee, especially where the public is not considered a party or the rights of other persons not parties to the record will not be affected thereby.[66]

It is customary that the appellant withdraw only as to himself and not as to his co-appellants. In this case it was held that where the several defendants are so identified that a judgment against one cannot be disturbed without affecting all the defendants, a dismissal as to one would operate as a dismissal as to all. In all cases of appeal the leave of court must first be obtained in order that the case may be dismissed,[67] and in some cases it is also considered necessary to obtain the consent of the appellee.[68]

An appeal which has not been perfected may be abandoned and recommenced, provided the prescribed limitation of time within which to appeal has not expired.[69] This rule has been held, however, not to apply where the appeal is abandoned by reason of not being perfected within the proper time, or where the parties fail to file the record within the proper time.[70]

62—Da Costa v. Dibble, 45 Fla. 225, 33 So. 52.

63—State v. Judges, 33 La. Ann. 151.

64—Bridendolph v. Zeller, 5 Md. 58; Masonic Temple Co. v. Com., 11 Ky. L. 383, 12 S. W. 143.

65—Hendon v. N. C. Ry., 127 N. C. 110, 37 S. E. 155; Johnson v. Von Kettler, 84 Ill. 315.

66—Mitchell v. Maupin, 3 T. B. Mon. (Ky.) 185; Walz v. N. O. R. Co., 35 La. 628.

67—Hyde v. Tracy, 2 Day (Conn.) 491; Merrill v. Deering, 24 Minn. 179; Cartlidge v. Sloan, 124 Ala. 569, 26 So. 918.

68—Wolf v. Poirier, 19 La. Ann. 103.

69—Osborne v. Logus, 28 Ore. 302, 37 Pac. 456; Ward v. Hollins, 14 Md. 158.

70—Cahill v. Cantwell, 31 Neb. 158, 47 N. W. 849.

An appeal which is taken before the final judgment has been rendered in the lower court is a mere nullity and does not in any way affect the right to a subsequent appeal within proper time.[71]

It is generally held that the failure to comply with some requirement concerning the perfecting of an appeal, the rendering it effective and causing its dismissal, does not bar a second appeal when taken in due time.[72] It is held in Illinois, however, that where an appeal is dismissed either by agreement of parties, or by any other method, excepting that the appeal was not perfected in proper form, that such dismissal will bar another appeal.[73] Mere insufficiency in the perfecting of an appeal, as for instance, where the petition in error was dismissed on the ground that the record attached was insufficient, is usually not held to bar a second appeal.[74] Nor is the mere lack of the certificate required by statute sufficient to bar the taking of a second appeal.[75]

The continued existence of a controversy is essential and for this reason the transfer or extinguishment of the appellant's right is generally considered sufficient for the dismissal of the case. Thus, where there is no litigable right, as where the relationship out of which the controversy arose has ceased to exist,[76] or where the case involved the right to an office of which the term has since expired.[77]

When it appears that the court has no jurisdiction it is within the power of the appellate court to dismiss the appeal,[78] or, where the proceedings do not comply with the rules of the court by reason of defects in the proceedings.[79]

71—Matter of Rose, 80 Cal. 166, 22 Pac. 86; Hook v. Richardson, 106 Ill. 392; Stokes v. Shannon, 55 Miss. 583.

72—Culliford v. Gadd, 131 N. Y. 632, 32 N. E. 136; Karth v. Light, 15 Cal. 324; State v. Silverstein, 77 Mo. App. 304.

73—Evans v. People, 27 Ill. App. 616.

74—Weeks v. Meddler, 20 Kan. 57.

75—Good v. Dalland, 119 N. Y. 153, 23 N. E. 474.

76—Stein v. Kesselgrew, 91 N. Y. Sup. 64.

77—Riggins v. Richards, 97 Tex. 526, 80 S. W. 524.

78—Doyle v. Wilkinson, 120 Ill. 430, 11 N. E. 890; Gunther v. Mason, 125 Ala. 644, 27 So. 843; Rose v. Richmond, 58 Ia. 54, 12 N. W. 80; Vandermark v. Jones, 4 Kan. App. 666, 46 Pac. 53.

79—McManus v. Swift, 76 Ia. 576; Talbot v. Davis, 6 Kan. App. 640; Dietrich v. Adams, 9 W. Notes (Pa.) 492; Smith v. Parks,

Wherever it appears that a controversy has ceased to exist, the court will usually dismiss an appeal or writ of error of its own motion.[80]

It is held that an appeal dismissed for want of prosecution leaves the case in the court below and does not bar a subsequent appeal taken within due time. Under this rule the failure to file a transcript of record within the proper time would not bar a subsequent appeal.[81] On the contrary, however, it is held that the dismissal of an appeal or writ of error operates as an affirmance of a judgment and bars any subsequent appeal.[82]

On this subject it is held in Missouri that where a party has appealed but for any reason has lost the benefit of his appeal that the lower court has lost jurisdiction and that further proceedings can only be had, if at all, by writ of error.[83]

The dismissal of a writ of error to the supreme court is held to be equivalent to a non-suit and cannot prevent further proceedings which are a matter of right until they have been barred by statutory provisions.[84] A second writ of error has been held proper to be sued out after the first has been dismissed.[85]

55 Tex. 82; Phenix Ins. Co. v. Hedrick, 69 Ill. App. 194.

80—McAdam v. People, 179 Ill. 316, 53 N. E. 1102; Ames v. Williams, 73 Miss. 772; Berks Co. v. Jones, 21 Pa. St. 4134.

81—Marshall v. Milwaukee R. Co., 20 Wis. 644; Williams v. Lapenotiere, 26 Fla. 333.

82—Ry. Co. v. Belt, 36 Ohio St., 93; Rowland v. Kreyenhagen, 24 Cal. 52; Casnova v. Kreusch, 21 W. Va. 720.

83—Brill v. Meek, 20 Mo. 358.

84—Garrick v. Chamberlain, 97 Ill. 620.

85—Power v. Frick, 2 Pa. 306.

PART II.

FORMS OF INSTRUCTIONS.

The forms of instructions given, have been held to state the law correctly in the cases cited and may readily be modified so as to make them applicable to other cases, **bearing in mind that an instruction is never proper unless based upon the evidence in the case.**

CHAPTER XVI.

CREDIBILITY OF WITNESSES IN GENERAL.

See Erroneous Instructions, same chapter head in Vol. III.

§ 327. Credibility and Weight of Testimony Are Questions of Fact. (a) The Jury are sole judges of the facts and the credibility of the witnesses, and the weight to be given their testimony.[1]

(b) You are the exclusive judges of the facts proven, of the credibility of the witnesses, and the weight to be given to the testimony.[2]

(c) You are the sole judges of the credibility of the witnesses and of the weight to be given to their testimony.[3]

(d) You are the exclusive judges of the credibility, of the weight of the evidence, and all the facts proved.[4]

1—Paxton et al. v. Knox et al., 123 Iowa 24, 98 N. W. 468.
2—Nite v. State, 41 Tex. Crim. App. 340, 54 S. W. 763.
3—Parkins v. Mo. Pac. R. Co., 4 Neb. unof., 93 N. W. 197; C. & A. R. R. Co. v. Fisher, 38 Ill. App. 33.
4—Bingon v. State, — Tex. Civ. App. —, 56 S. W. 339.

(e) You are the sole judges of the credibility of the witnesses and of the weight to be given to the testimony.[5]

(f) You are the judges of the credibility of the witnesses, and the weight to be attached to the testimony of each and all of them.[6]

(g) The jury are the sole judges of the facts in this case, and they are to determine this case upon their understanding of the facts introduced in evidence solely, without regard to any other person's opinion thereon, no matter whoever they may be.[7]

(h) The court does not, in any of the instructions which it is giving you, mean or intend to tell you, or even to intimate to you, what any of the facts in this case are, but you are the sole judges of what the facts in this case are; and also the court does not in any of its instructions to you, mean or intend to say, or even to intimate, what your verdict in this case should be.[8]

(i) The jury are by law made the sole and responsible judges of the evidence; it is their duty to determine the weight and effect of the evidence as a whole and as necessary to such determination to recall and weigh the testimony of each witness and judge his or her credibility as best they can in the light of the whole facts as disclosed by the evidence.[9]

(j) You are the exclusive judges of the credibility of the witnesses examined on this trial, and you will determine for yourselves the weight that should be given to the testimony of each one of them, and to each fact and circumstance in evidence in the case,

5—Galveston, H. & S. A. Ry. Co. v. Williams, 26 Tex. Civ. App. 153, 62 S. W. 808.

6—State v. McPhail, 39 Wash. 199, 81 Pac. 683. In approving the above instruction the court said:

"The appellant contends that the jury should have been instructed that they were the sole judges of the facts. The charge given was correct as far as it went, and if the appellant desired a more specific charge, or a charge in the language of the statute, he should have requested it. There was no error in the charge given."

7—Zube v. Weber, 67 Mich. 52, 34 N. W. 264.

The court held the refusal to give the above instruction was reversible error.

8—W. C. St. R. R. Co. v. Vale, 117 Ill. App. 155. The court in commenting on the above instruction said: "Appellant asserts that this instruction is misleading and erroneous, because it tends to make the jury independent of the court, and to give them the impression that they are at liberty to decide the case regardless of the instructions and of the evidence. If it be admitted that this instruction is defective in not stating to the jury that they were to find the facts from the evidence, and in not telling them that in determining the facts they were to be guided by the instructions of the court, such defect is not necessarily reversible error. Instructions are to be considered as a single series, and when so considered, if, as a whole, they state the law correctly, it is sufficient, even though one or more of them, standing alone, might be erroneous. Central Ry. Co. v. Bannister, 195 Ill. 50." See also State v. McCarver, 194 Mo. 717, 92 S. W. 684; State v. Morgan, 27 Utah 103, 74 Pac. 526; State v. Burton, 27 Wash. 528, 67 Pac. 1097; State v. Todd, 194 Mo. 377, 92 S. W. 674; Goodwine v. State, 5 Ind. 43, 31 N. E. 554.

9—Cupps v. State, 120 Wis. 504, 97 N. W. Rep. 210, 102 Am. St. Rep. 996.

and after carefully weighing and considering all the evidence, facts and circumstances, you will determine for yourselves what allegations contained in the complaint have been proven by a preponderance of the evidence and what have not.[10]

§ 328. Credibility—What the Jury Should Consider in Passing Upon. (a) You are the sole judges of the credibility of the witnesses, and of the weight to be given their testimony. You may take into consideration their interest, bias, or prejudice, if any, their relationship to the parties and to the case, if any, the probability or improbability of the story related by them, and any and all other facts and circumstances in evidence which in your judgment would add to or detract from their credibility or the weight of their testimony.[11]

(b) The jury are sole judges as to the credibility of witnesses, and, in determining whether witnesses will be believed or not, they are not bound by the opinions of other witnesses, but have a right to consider all the testimony of the case, the motives and the interests of the witness, the nature of his testimony, and all the facts in evidence throwing light upon the point.[12]

(c) The jury are instructed that in determining what facts are proven in this case, they should carefully consider all the evidence before them, with all the circumstances of the transaction in question as detailed by the witnesses, and they may find any fact to be proven which they think may be rightfully and reasonably inferred from the evidence given in the case, although there may not be any direct testimony as to such fact.[13]

§ 329. Where the Evidence is Conflicting. (a) The court instructs the jury that the credibility of the witnesses is a question exclusively for the jury, and the law is that where a number of witnesses testify directly opposite to each other, the jury are not bound to regard the weight of the evidence as evenly balanced. The jury have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness or lack thereof, the reasonableness or unreasonableness of the story told by them, their apparent intelligence or lack of intelligence, and from all the surrounding circumstances appearing on the trial, which witnesses are more worthy of credit, and to give credit accordingly.[14]

10—Kreag v. Anthis, 2 Ind. App. 482, 28 N. E. 773. In approving this instruction the court said: "This fairly left the whole matter to the jury upon the evidence, without intimation that any particular fact had been proved. It could be said with equal force that the instruction assumed that some of the allegations of the complaint were not established by the evidence. No right of appellant was prejudiced by the instruction."

11—Dysart-Cook Mule Co. v. Reed & Heckenlively, 114 Mo. App. 296, 89 S. W. 591.

12—Brown v. State, 75 Miss. 842, 23 So. 422.

13—Herring v. Ervin, 48 Ill. App. 369 (371).

14—Wallace v. State, 28 Ark.

(b) You are instructed, that it does not necessarily follow that a plaintiff has failed to establish his case (or a defendant his defense) by a preponderance of proof, because he has testified to a state of facts which are denied by the testimony of the opposite party. In such a case, in arriving at the truth, you have a right to take into consideration every fact and circumstance proven on the trial, such as the situation of the parties; their acts at the time of the transaction and afterwards, so far as they appear in evidence; their statements to third parties in relation to the matters in question, as well as their statements to each other in the presence of third parties, if any such statements have been proved; also their appearance on the witness stand, and their manner of testifying in the case.[15]

(c) If you find different witnesses contradicting each other, then as reasonable, intelligent men, weigh the testimony of the state going to show the falsity of defendant's statement against the evidence showing its truth, and try and determine which you must believe.[16]

§ 330. Duty of Jury to Reconcile Conflict of Testimony. (a) The court instructs the jury to consider all the testimony in the case bearing on the issues of fact submitted to them, to reconcile any and all apparently conflicting statements of the witnesses, and, if practicable, to deduce from the evidence any theory of the case which will harmonize the testimony of all the witnesses; and it should be your duty to adopt that theory rather than one which would require them to reject any of the testimony as intentionally false.[17]

(b) You are the exclusive judges of the weight of the evidence before you, and of the credit to be given to the witnesses who have testified in the case. If there is a conflict in the testimony, you must reconcile it, if you can. If not, you may believe or disbelieve any witness or witnesses, according as you may or may not think them entitled to credit. In civil cases the jury is authorized to decide according as they may think the evidence preponderates in favor of one side or another.[18]

531; Halloway v. Com., 11 Bush (Ky.) 344; Stampofski v. Steffens, 79 Ill. 303; State v. Shields, 55 Conn. 256; Shellabarger v. Nefas, 15 Kan. 547; Halloway v. Com., 12 Bush 234; H. P. Ry. Co. v. Ward, 4 Colo. 37; Winchester v. King, 48 Mich. 280, 8 N. W. 722.

An instruction was approved which told the jury that in weighing the testimony of the witnesses they had a right to take into consideration the apparent intelligence or lack of intelligence of the witnesses. Approved City of La Salle v. Kostka, 190 Ill. 130, 60 N. E. 72.

An instruction of substantially the same import was approved in Chicago & Alton R. R. Co. v. Winters, 175 Ill. 293, 51 N. E. 901, affg. 65 Ill. App. 435. Fisher v. State, 77 Ind. 46; N. C. St. R. R. Co. v. Welner, 206 Ill. 272, 69 N. E. 6, affg. 105 Ill. App. 652; Pressed Steel Car Co. v. Herath, 110 Ill. App. 596 (598).

15—Mathews v. Story, 54 Ind. 417; Klassen v. Reiger, 26 Minn. 59; Prowattain v. Tindale, 80 Penn. St. 295; Stampofski v. Steffens, 79 Ill. 303; K. P. R. Co. v. Little, 19 Kans. 267.

16—McClerkin v. State, 105 Ala. 107, 17 So. 123.

17—H. Hirschberg O. Co. v. Michaelson, — Neb. —, 95 N. W. 461 (463).

18—In Houston & T. Cent. R. Co. v. Bell, — Tex. Civ. App. —, 73 S. W. 56 (62), the court said: "The

§ 331. **Equal Number of Witnesses On the Same Point On Each Side.** (a) The court instructs you, as a matter of law, that where two witnesses testify directly opposite to each other on a material point, and are the only ones that testify directly to the same point, you are not bound to consider the evidence evenly balanced or the point not proved; you may regard all the surrounding facts and circumstances proved on the trial, and give credence to one witness over the other, if you think such facts and circumstances warrant it.[19]

(b) If two witnesses of equal credibility testify in conflict with each other, the jury may look to the opportunity of the two witnesses to know the facts about which they testify in determining which witness they will believe.

(c) If there is a conflict in the evidence then the jury may look to the opportunities and means of knowledge of the various witnesses in determining which of them they will believe.[20]

(d) The court further instructs the jury that where witnesses testify directly opposite to each other on a material point, the jury are not bound to consider the point not proved. The jury has a right to, and may regard, all surrounding circumstances proved on the trial, and give credence to one witness over the other, if the jury think such facts and circumstances warrant it. So, in this case, although the plaintiff, upon the question whether she fell from the car on the street, may testify one way, and the conductor and policeman may swear the other way, the jury are not bound to consider the point not proven. The jury may give credence to the plaintiff upon this point, if the jury believe the facts and circumstances bearing on the point in evidence warrant their doing so.[21]

(e) The court instructs you that where two witnesses testify directly opposite to each other on a material point, you are not bound to consider the evidence evenly balanced so far as those two witnesses are concerned, but that you may regard all the surrounding facts and circumstances and other evidence, if any, and give credence to one witness over the other if you think such facts, circumstances and evidence warrant it.[22]

§ 332. **Conflicting Testimony—What Jury Should Consider.** (a) You are the exclusive judges of the credibility of the witnesses, and it is your duty to reconcile any conflict that may appear in the evi-

instruction is an exact copy of that which was given in the case of Railway Co. v. Ende, 65 Tex. 124."

19—Miller v. Balthasser, 78 Ill. 302; Durant v. Rogers, 87 Ill. 508; Lawrence v. Maxwell, 58 Barb. (N. Y.) 511; Delvee v. Boardman, 20 Iowa 446; Johnson v. Whidden, 32 Me. 230.

20—Jones v. Ala. M. R. R. Co., 107 Ala. 400, 18 So. 30 (32).

21—W. C. S. R. R. Co. v. Lieserowitz, 99 Ill. App. 594.

22—Chi. & E. Ill. R. R. Co. v. Rains. 106 Ill. App. 538, aff. 203 Ill 417, 67 N. E. 840. Durant v. Rogers, supra, the court said: "This instruction correctly states the law as we understand it. In cases of this character of the one at bar, this instruction has often been given, and so far as we are advised has always been approved and never condemned."

dence, as far as may be in your power, upon the theory that each witness has sworn to the truth. When this cannot be done, you may consider the conduct of the witnesses upon the stand, the nature of the evidence given by them, how far they are corroborated or contradicted by other testimony, their interest, if any, in the cause, their relation to the parties, and such other facts appearing in the evidence as will, in your judgment, aid you in determining whom you will believe, and you may, also, in considering who you will, or, will not, believe, take into account your experience and relations among men.[23]

(b) It is your duty to weigh the evidence carefully, candidly and impartially, and in so weighing it you should be careful to draw reasonable inferences, not to pick out any particular fact and give it undue weight, but you should give it such weight as you think it is entitled to as reasonable men looking at it impartially. You should consider the evidence all together. Where there is a conflict in the testimony, you should reconcile it, if you can, upon any reasonable hypothesis. If you cannot reconcile their testimony, then you must determine whom you will believe. You are the sole judges of the facts.[24]

(c) The credibility of witnesses that have been examined in your hearing is for you to determine, and, where witnesses have testified directly the opposite to each other, it is your duty to say from the appearance of such witnesses, while so testifying, their manner of testifying, their apparent candor and fairness or want of candor or fairness, their apparent intelligence or want of intelligence, their interest or want of interest in the result of the litigation, and from

23—In Jenney Electric Co. v. Branham, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395, the court in approving the above said: "Jurors should be, and, as a rule, are, selected because of their extensive experiences among men. The school of experience which men attend in their varied relations among men imparts a keenness of mental vision which enables them the more readily to see the motives and to judge of the selfish or unselfish interests of men. This education, be it much or little, is a part of the juror, and should not, if possible, be laid aside in passing upon the inducements which may surround a witness to speak falsely. It is this education which to a great extent enables a juror to discover in the faltering manner or the downcast eye whether the statement of the witness is made in modesty or the guilt of falsehood.

"The value of experience is not to be given up when the man becomes a juror, and is required to apply the tests of credit to the heart and mind of the witness, but whatever qualification that experience gives should be employed to the end that the whole truth may be known and acted upon. While, as we understand the charge, it did not tell the jurors that they should employ it, they were told that it was proper to employ it; not, as counsel for appellant contend, as allowing a juror to bring forward some special experience or some special business transaction within his observation, bearing some similarity to the question on trial, and which had miscarried, and to conclude, therefore, that some phase of the present case should miscarry. The instruction was confined to the tests of credit and the weight of the evidence of the witnesses, and the clause in question was to be construed with reference alone to its bearing upon those tests."

24—Rio Gr. W. R. Co. v. Leak, 63 U. S. 280 (283), 16 S. C. 1020.

these and all the other surrounding circumstances appearing in evidence on the trial, which of such witnesses are the more worthy of credit, and to give credit accordingly.[25]

§ 333. The Jury Have No Right to Disregard the Testimony of Any Witness Without Cause. (a) You are instructed, that if the testimony of a witness appears to be fair, is not unreasonable, and is consistent with itself, and the witness has not been in any manner impeached, then you have no right to disregard the testimony of such witness from mere caprice or without cause. It is the duty of the jury to consider the whole of the evidence, and to render a verdict in accordance with the weight of all the evidence in the case.[26]

(b) The jury are instructed that they have no right to disregard the testimony of any of the defendant's witnesses through caprice or without cause, merely for the reason that they are in the employ of a railroad company. The credibility of defendant's witnesses should be judged by the jury precisely the same as they judge the credibility of other witnesses.[27]

(c) A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he or she testifies, by the character of his or her testimony, or by his or her motives, or by contradictory evidence. You are instructed that your power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion and in subordination to the rules of evidence. The jury are the exclusive judges of the credibility of the witnesses and the weight to be given their testimony.[28]

§ 334. Credibility of Witnesses—How Determined. (a) You are the sole judges of the credibility of the witnesses, of the weight of the evidence, and of the facts. It is your right to determine from the appearance of witnesses on the stand, their manner of testifying, their apparent candor or frankness or the lack thereof, which witnesses are more worthy of credit, and to give weight accordingly. In determining the weight to be given to the testimony of the witnesses you are authorized to consider their relationship to the parties, when the same is proved, their interest, if any, in the event of the

25—First Nat. Bank v. Carson, 30 Neb. 104, 46 N. W. 276 (278).

In Jenney Elec. Co. v. Branham, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395, the court said of this instruction:

"There was no error in giving this charge. It stated the law correctly, citing Rex. v. Roeser, 7 Car & P., 648, 32 Eng. Com. Law, 670; Johnson v. Hillstrom, 37 Minn. 122, 33 N. W. 547; Kitzinger v. Sanborn, 70 Ill. 146; Dunlop v. U. S., 165 U. S. 486, 17 Sup. Ct. 375, 41 L. Ed. 799; Sanford v. Gates, 38 Kan. 405, 16 Pac. 807; Rosenbaum v. State, 33 Ala. 354; Schmidt v. Insurance Co., 1 Gray 529." Ala. Min. R. Co. v. Jones, 114 Ala. 519, 21 So. 507, 62 Am. St. Rep. 121.

26—City Bank, etc. v. Kent, 57 Ga. 283; Smith v. Grimes, 43 Iowa 356; Rockford, R. I. & St. L. Rd. Co. v. Coultars, 67 Ill. 398; Oliver v. Pate, 43 Ind. 132.

27—In Hintz v. Mich. Cent. R. R. Co., 140 Mich. 565, 104 N. W. 23, the court said: "This request might have very properly been given. See Gregory v. Det. Un. Ry. Co. 138 Mich. 368, 101 N. W. 546. But it does not follow that it was error to refuse it."

28—State v. Dotson, 26 Mont. 305, 67 Pac. 938 (940).

suit, their temper, feeling or bias, if any has been shown, their demeanor on the stand, their means of information and the reasonableness of the story told by them, and to give weight accordingly.[29]

(b) You are instructed that the credibility of the witnesses is a question exclusively for the jury to exclusively determine. You can give to the testimony of each witness just such weight as you think it is entitled to, and, in determining the weight to be given to the testimony of the several witnesses, you should take into consideration their interest in the result of the suit, if any such interest is proven; their conduct and demeanor while testifying; their apparent fairness or bias, if any such appears; their opportunity for seeing or knowing the things about which they testify; the reasonableness or unreasonableness of the story told by them; and all the evidence and facts and circumstances proven tending to corroborate or contradict such witness, if any such appear.[30]

(c) The jury are instructed that, in determining the weight to be given the testimony of a witness, you will take into consideration the intelligence of the witness, the circumstances surrounding the witness at the time concerning which he testifies, his interest, if any, in the event of the suit, his bias or prejudice, if any; his manner on the witness stand, his apparent fairness or want of fairness, the reasonableness of his testimony, his means of observation and knowledge, the character of his testimony—whether negative or affirmative, of any fact, and all matters and facts and circumstances shown on the trial, bearing upon the question of the weight to be given to his testimony, and give each witness' testimony such weight as to you it may seem fairly entitled to.[31]

(d) You are the sole judges of the evidence in the case. It is your sole duty to determine the weight and credibility of the testimony; and in weighing the testimony of the witnesses you have a right to consider the interest the witnesses have in the verdict, their candor and fairness, their manner and bearing while testifying before you, the reasonableness of their story, the means and opportunity of knowing the facts about which they testify, the consistency of their testimony with other known facts in the case, and any other matter that tends to impress your minds with the truth or untruth of their testimony. If there is a conflict in the testimony of witnesses, it

29—In State v. Morgan, 27 Utah 103, 74 Pac. 526, the court said: "In the case of the United States v. Bassett, 5 Utah 131, 13 Pac. 237, an instruction substantially the same as the one under consideration, and in which this language occurred: 'You are the sole judges of the facts, of the credibility of the witnesses and of the weight of the evidence, and in determining the credibility of the witnesses and the weight of the testimony you should take into consideration the appearance of the witnesses upon the stand, their apparent candor or the want of candor, their interest in the outcome of the case, their relation to the parties interested in any way, and all the facts and circumstances surrounding the witnesses.'"

30—State v. Burton, 27 Wash. 528, 67 Pac. 1097.

31—C. B. & Q. v. Pollock, 195 Ill. 156 (162), 62 N. E. 831.

is your duty to say where the truth lies. You are not bound to accept as true the statements of witnesses where they are unreasonably inconsistent with each other, or with known facts in the case. You are not, however, to reject the testimony of a witness without reason.[32]

§ 335. Credibility of Witnesses—Preponderance—How Determined. (a) In determining the weight to be given the testimony of the different witnesses, you should take into account the interest, or want of interest, they have in the case, their manner on the stand, the probability or the improbability of their testimony, with all other circumstances before you which can aid you in weighing their testimony.[33]

(b) In determining upon which side the preponderance of the evidence is, the jury should take into consideration the opportunity of the several witnesses for seeing or ascertaining from their own personal knowledge the things about which they testify, their conduct and demeanor while testifying, their interest, or lack of interest, if any, in the result of the case; the relation or connection, if any, between the witnesses and the parties, the apparent consistency, fairness and congruity of the evidence, the probability or improbability of the truth of their several statements, in view of all the other evidence, facts and circumstances proved on the trial, and from all these circumstances determine upon which side is the weight or preponderance of the evidence.[34]

(c) In considering and determining what weight or effect you will give the testimony of each witness, you should take into consideration what interest or want of interest the witness had in the result of the suit, his or her demeanor upon the stand, the apparent

32—Goodwine v. State, 5 Ind. App. 63, 31 N. E. 554, the court said: "It does not invade the province of the jury to tell them what they have a right to consider. The jury are here admonished that they may consider these things in determining the weight of the evidence, and this is right. The argument that the court had no right to assume that there are certain known facts in the case is likewise fallacious. That there were in this as there are in every case, certain known facts needs no argument to establish."

33—Deal v. State, 140 Ind. 354, 39 N. E. 930. In Lynch v. Bates, 139 Ind. 206, 38 N. E. 806 (807), in approving a similar instruction the court said: "The instruction amounts to no more than a statement that it is the duty of the jury in determining the weight to be given to the testimony of the witnesses, to consider all the evidence bearing on that question; that is, their interest or want of interest in the case, their manner on the witness stand, the probability or improbability of their testimony, with all the circumstances in evidence which may aid them in weighing such testimony. It is conceded by the learned counsel for the appellant that the instruction was copied from an instruction approved by this court, and held good, in Anderson v. State, 104 Ind. 472, 4 N. E. 63, and 5 N. E. 711."

The court followed the above with an exhaustive review of the authorities in the state of Indiana bearing upon instructions relating to the weight of the evidence, and concluded by holding that the above instruction was not erroneous.

34—C. & G. T. Ry. Co. v. Spurney, 69 Ill. App. 549; C. & P. St. Ry. Co. v. Rollins, 95 Ill. App. 497.

intelligence or want of intelligence of the witness, the opportunity or want of opportunity of the witnesses for knowing the facts concerning which they testify, the probability or improbability of the facts related by the witnesses, and their apparent candor and fairness, or want of such. Where witnesses directly contradict each other, you should consider all the testimony in the case, and, after considering it all, and the surrounding circumstances appearing on the trial, determine which of the witnesses are the most worthy of credit, and give credit accordingly.[35]

(d) The jury are instructed that they are the sole judges of the credibility of the witnesses and of the weight to be given to their testimony. In determining such credibility and weight they will take into consideration the character of the witness, his manner on the stand, his interest if any, in the result of the trial, his relation to, or feeling towards the parties, the probability or improbability of his statements, as well as the facts and circumstances given in evidence. And in this connection you are further instructed that if you believe that any witness has wilfully and knowingly sworn falsely to any material fact, you are at liberty to reject all or any portion of such witness' testimony.[36]

(e) In considering the question of the alleged negligence of the defendant, you are to take into consideration all of the evidence, the number, character and appearance of the witnesses, the interest, if any, which any of them may have in the event of the suit, the manner of their giving their testimony, their apparent fairness and candor, and the probability, in connection with all of the evidence and the circumstances surrounding the matters testified to, and of the truth of the matters testified to, by the several witnesses. This is not only applicable to the witnesses for the defendant, but is applicable to all the witnesses that have testified in this case. You are to judge of the amount of credibility that is to be given to the testimony, as given here under oath, by their appearance and by the interest that they may appear to have, and by the motives that they may seem to be influenced by. You are not at liberty to reject the testimony of any witness, except for a good and substantial reason, which convinces your mind that his or her testimony has been substantially untrue, or improbable or unreliable.[37]

§ 336. Affirmative Evidence Compared with Negative. (a) The court charged the jury, that affirmative evidence is rather to be believed than negative, when witnesses testifying to affirmative and negative facts are equally reliable, and are shown to have had equal opportunities for observation. . . . . The jury are the sole and exclusive judges of the evidence, and it is the duty of the jury to

35—Jessen v. Donahue, — Neb. —, 96 N. W. 639.

36—In Titterington v. State, — Neb. —, 106 N. W. 421 (422), it was held to be error to refuse the above instruction.

37—Hardy v. Mil. St. Ry. Co., 89 Wis. 183, 61 N. W. 771.

weigh the testimony of all witnesses, and it is in the province of the jury to accept or reject all or any part of the testimony of any witness, and it is for the jury to judge of the credibility of witnesses.[38]

(b) The positive testimony of one credible witness to a fact is entitled to more weight than the testimony of several witnesses equally credible, who testify negatively or to collateral circumstances merely persuasive in their character from which a negative may be inferred.[39]

(c) You are instructed that the evidence of witnesses, one or more, to the effect that they passed over the sidewalk in question, and that they did not see any loose plank or planks, is negative in character, and is, in itself, entitled to comparatively little weight, as compared to testimony of equally credible witnesses, if such there were, who testified to passing over said sidewalk at about the same time and found loose plank or planks, if such witnesses so testified.[40]

38—State v. Weston, 107 La. 45, 31 So. 383.

"Taking the charge as a whole we can see in it no error of law. It is not incorrect to say that 'affirmative evidence is rather to be believed, than negative evidence, when witnesses testifying to affirmative and negative facts are equally reliable, and are shown to have had equal opportunities for observation.' State v. Chevalier, 36 La. Ann. 84; State v. Dorsey, 40 La. Ann. 742, 5 So. 26.

And, also, it is not incorrect to say 'that the jury are the sole and exclusive judges of the evidence, and that it is the duty of the jury to weigh the testimony of all witnesses, and that it is in the province of the jury to accept or reject all or any part of the testimony of any witness, and that it is for the jury to judge of the credibility of witness.' The charge may be objectionable, in that it does not explain what is meant by 'negative evidence' as contradistinguished from affirmative evidence; and it is possible that the witnesses giving negative testimony had not only enjoyed equal opportunities for observation, but had exercised the opportunities, so that under the doctrine of the cases of Chevalier and Dorsey, cited above, their testimony was entitled to equal weight with the affirmative testimony; but if, in these respects, and in the other respects specified in defendant's second bill, the charge was defective and objectionable, these were matters which the trial judge could have rectified if his attention had been called to them, and which the defendant cannot take advantage of, he having failed to call the judge's attention to them."

39—Roedler v. C. M. & St. P. Ry. Co., 129 Wis. 270, 109 N. W. 89. "The law on the subject has frequently been discussed by this court, and need not here be reiterated, citing Joannes v. Millerd, 90 Wis. 68 (70, 71), 62 N. W. 916; Steinhofel v. C. M. & St. P. Ry. Co., 92 Wis. 123 (129), 65 N. W. 852; Alft v. Clintonville, 126 Wis. 334 (338, 339), 105 N. W. 561; and cases there cited. As said in the opinion and held by the court in one of these cases: 'Whether the testimony of witnesses whose attention was called to the noise of the train and who were listening to it, that they did not hear a signal, is merely negative testimony or a mere scintilla of evidence, may be doubted.' 92 Wis. 123 (129), 65 N. W. 852 (853). We cannot say that there was error in submitting such questions to the jury, nor in refusing further instruction on the subject."

40—Alft v. City of Clintonville, 126 Wis. 334, 105 N. W. 561.

"The criticism is that the portion of the charge so given left the jury to infer that there were 'one or more' witnesses who passed over the sidewalk in question and 'did not see any loose plank or

§ 337. **Credibility—Former Life of Witness.** (a) The jury are the sole judges of the credibility of witnesses and the weight to be given to their testimony, and in passing upon the testimony of any witness the jury have a right to take into consideration the interest any such witness may have in the result of this trial, the manner of testifying, and the former life or history any such witness may have given of him or herself in this case.[41]

(b) I charge you further that in weighing the testimony of a witness you should take into consideration his general character, what his business is and has been, who he is, where he comes from, and what his antecedents are, if the same have been proven. These are all circumstances which it is proper for you to consider in determining for yourself just what weight should be given to the testimony of any particular witness, either for the state or for the defendant, who has testified in the case.[42]

§ 338. **Interest of Witnesses.** (a) If you believe from the evidence that any witness who has testified in this case is interested in the result of this suit as a party or otherwise, then, in determining the credit to be given to such witness, the jury may take into consideration such interest as the evidence shows such witness has, together with all the other facts and circumstances disclosed by the evidence, if any, which will aid the jury in arriving at and determining the credit to which the testimony of such witness is entitled.[43]

(b) You will consider all the testimony of all the witnesses, taking into consideration the state of a witness' feeling towards any party to the case, or his or her interest in the result of the case. In other words, consider, is he or she interested in the result of the trial, as such is shown by the evidence. All this is to be considered by you in determining the credit to be given the testimony of every witness. Their manner, interest or bias, if shown, as also the reasonableness or unreasonableness of the testimony of the wit-

planks,' and hence their testimony was 'negative in character,' and, comparatively, was not entitled to as much weight as the testimony of equally credible witnesses, 'if such there were, who testified to passing over said sidewalk about the same time and found loose plank or planks, if such witnesses so testified.' Of course, a person might pass over a sidewalk without observing a loose plank in case he failed to step on it. We are constrained to hold that there were 'one or more' witnesses to whom such portion of the charge was applicable. The charge so given to the jury is abundantly justified by repeated decisions of this court."

See also Hinton v. Cream City R. R. Co., 65 Wis. 323, 27 N. W. 147; Joannes v. Millerd, 90 Wis. 68, 62 N. W. 916.

41—It was not improper or prejudicial either, in this case, to tell the jury they might consider the former life or history of any witness as given by himself or herself in determining the credibility. Lancashire Ins. Co. v. Stanley, 70 Ark. 1, 62 S. W. 66 (67).

42—State v. Haynes, 7 N. D. 252, 75 N. W. 267 (269). The court said: "This instruction is purely cautionary, and is fair and impartial as between the witnesses for the state and those of the defendant."

43—C. C. Ry. Co. v. Tuohey, 196 Ill. 410 (430), 63 N. E. 997, 58 L. R. A. 270.

ness, may be considered by the jury. The fact that a witness is jointly indicted for the same offense with the defendant, and for which the defendant is on trial, may be considered by you in fixing the credit you will give to the testimony of such witness.[44]

(c) The jury are instructed that in determining the credibility of a witness you may consider the interest, if any shown, which he may have in the result of the trial, the probability of the truthfulness of his testimony, and all the other things which ordinarily affect the truthfulness of evidence.[45]

(d) The credit of a witness depends largely upon two things, that is:—first, his ability to know what occurred and his disposition for telling the truth as to the occurrence. Statements by a witness having superior opportunities for knowing what took place and superior intelligence and memory, and entirely uninterested in the event of the suit, other things being equal, are entitled to greater weight before the jury. One of the tests for determining the credibility of a witness is his interest in the result of the suit. As a general rule, a witness who is interested in the result of a suit will not be as honest, candid, and fair in his testimony as one who is not so interested; but the degree of credit to be given to each and all of the witnesses is a question for the jury alone, and not for the court.[46]

44—Cochran v. State, 113 Ga. 726, 39 S. E. 332 (333).

"It is alleged that this charge was erroneous because 'it goes too far towards individualizing the witness, and is argumentative, and would naturally be considered by the jury as singling out those witnesses for the defendant who were relatives of the defendant,' and because such charge also went too far in pointing out to the jury to consider whether the witnesses were jointly indicted for the same offense with the defendant, and in compelling the jury to consider this as a circumstance. Three of the witnesses who testified for the defense were jointly indicted with the prisoner on trial —two of them as principals in the crime charged, and one of them as accessory. Two of these witnesses were his brothers, and other witnesses who testified in his behalf were closely related to him by blood or affinity. These were circumstances which the jury had the right to take into consideration when weighing the testimony of these respective witnesses. Where the testimony in a case conflicts, it is the duty of the jury, if they cannot reconcile it, to determine where the truth lies, and in order to do this they must take into consideration the credibility of the respective witnesses; and in passing upon the credibility of any witness they can consider any circumstance shown by the evidence which would naturally tend to bias or prejudice such witness in favor of the one side or the other."

45—Mendenhall v. Stewart, 18 Ind. App. 262, 47 N. E. 943.

The court said: "While it is true that it cannot be said as a matter of law that because a witness may be interested in the result of a litigation less weight shall be given to his testimony, yet this instruction is not directed to any particular witness on either side, and tells the jury, in effect, that being interested in the result of the suit was a matter they might consider in determining the truthfulness of evidence. The jury were not told that the truthfulness of evidence depended upon whether or not the witness was interested. The weight that any testimony has depends upon the probability of its truthfulness or untruthfulness."

46—McPherson et al. v. Commercial Natl. Bk., 61 Neb. 695, 85 N. W. 895 (896). The court said: "This instruction, in effect, told

(e) You are to determine the questions of fact which are raised by the testimony in this case, and in determining those questions I can give you no assistance whatever, except to say that the credibility of the witnesses, of all the witnesses in this case, is entirely a question for you. You have heard the testimony given on both sides. You are to weigh the testimony, and consider the testimony of each of the witnesses by the same rule. You will consider the interest which each one has in the case. You will consider his manner of giving his testimony, whether it impresses you as being a truthful statement of what he knows or not. You will consider the opportunities he had for observing because it appears that some of the witnesses had excellent opportunities for observing what was going on, and some had almost no opportunity, saw very little.[47]

§ 339. Disinterested Witnesses—Means of Information. (a) The jury are instructed that you may consider the probability or improbability of the testimony of the witnesses who have no interest in the matter, remembering just what was said between the conductor and the plaintiff just prior to the ejection.[48]

(b) The court instructs the jury that in determining the credibility of the witnesses you have a right to take into consideration the means of information of the several witnesses.[49]

§ 340. Uncontroverted Testimony of Credible Witness. (a) You are instructed that the uncontroverted testimony of a credible witness ought not to be lightly disregarded, and you have no right to substitute a fanciful hypothesis to account for facts which are explained by direct testimony. Your verdict should be based on the evidence, and that alone; and it is the duty of the jury to harmonize all proven facts, if possible, with the conditions found surrounding the case, and the circumstances proven to have existed at the time of the occurrence.[50]

the jury, and properly so, that the credibility of the witnesses was for them alone to pass upon, and in determining that question the interest of a witness is proper to be considered. But see Himrod Coal Co. v. Clingler, 114 Ill. App. 568, where the court holds the above instruction erroneous.

47—People v. Blanchard et al, 136 Mich. 146, 98 N. W. 983.

48—Bowsher v. C. B. & Q. R. Co., 113 Iowa 16, 84 N. W. 958 (960).

"The complaint is not that this is an erroneous statement of the law, but that it improperly singled out this phase of the case to the defendant's prejudice. The instruction fully and fairly presented the rules for weighing the evidence. It is contended that, as a number of disinterested witnesses gave testimony different from that of the plaintiff as to what occurred between the plaintiff and the conductor, this part of the instruction was prejudicial. We think, in view of the contradictions, it was called for, and proper."

49—Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035.

50—Card v. Fowler, 120 Mich. 646, 79 N. W. 925 (928).

CHAPTER XVII.

CREDIBILITY—SWEARING FALSELY.

See Erroneous Instructions, same chapter head in Vol. III.

§ 341. Credibility—How Determined—Witness Swearing Falsely—Missouri Rule. (a) To the jury alone belongs the duty of weighing the evidence and determining the credibility of the witnesses. The degree of credit due to a witness should be determined by the jury, by his or her character and conduct, by his or her manner upon the stand, his or her fears, his or her bias, or impartiality, the reasonableness or unreasonableness of the statements he or she makes, the strength or weakness of his or her recollection, viewed in the light of the other facts and circumstances in proof; and, if the jury believe that any witness has willfully sworn falsely as to any material fact in the case, they may disregard the whole of the evidence of any such witness.[1]

(b) The jury are the sole judges of the credibility of the witnesses and of the weight and value to be given to their testimony. In determining as to the credit you will give a witness, and the weight and value you will attach to a witness' testimony, you should take into consideration the conduct and appearance of the witness upon the stand, the interest of the witness, if any, in the result of the trial, motives actuating the witness in testifying, the witness' relation to, or feeling for or against the defendant, or the alleged injured party, the probability or improbability of the witness' statements, the opportunity the witness had to observe and to be informed as to matters respecting which such witness gives testimony, and the inclination of the witness to speak truthfully or otherwise

1—State v. Pollard, 174 Mo. 607, 74 S. W. 969.

as to matters within the knowledge of such witness. All these matters being taken into account, with all other facts and circumstances given in evidence, it is your province to give each witness such value and weight as you deem proper. If upon a consideration of all the evidence, you conclude that any witness has sworn willfully falsely as to any material matter involved in the trial, you may reject or treat as untrue the whole or any part of such witness' testimony.[2]

(c) In arriving at your verdict in this cause it is your duty to take into consideration all the facts and circumstances detailed in evidence, the interest, if any, which the witnesses testifying have in the result of the litigation; and if the jury believe that any witness has knowingly and willfully sworn falsely as to any material matter in issue, then you are at liberty to disregard the whole or any part of the testimony of such witness.[3]

§ 342. **Interest of Witnesses—Swearing Falsely.** (a) The jury are instructed, that in determining the questions of fact in this case, they should consider the entire evidence introduced by the respective parties; but the jury are at liberty to disregard the statement of all such witnesses, if any there be, as have been successfully impeached, either by direct contradiction or by proof of having made different statements at other times, or by proof of bad reputation for truth and veracity in the neighborhoods where they live—except in so far as such witnesses have been corroborated by other credible evidence, or by facts or circumstances proved on the trial.[4]

(b) In weighing the testimony of each witness, the interest, or absence of interest, of such witness in the result of the trial should be taken into consideration by the jury. If the jury believe from the evidence that any witness has willfully and knowingly sworn falsely to any material fact in this trial, it is competent for the jury to wholly disregard the testimony of such witness, so far as it is in favor of the side calling him, if they believe his testimony wholly unworthy of belief.[5]

2—State v. Vaughan, 200 Mo. 1, 98 S. W. 2; State v. Darling, 199 Mo. 168, 97 S. W. 592; State v. Hottman, 196 Mo. 110, 94 S. W. 237; State v. Todd, 194 Mo. 377, 92 S. W. 674; Longan v. Weltmer, 180 Mo. 322, 79 S. W. 655 (657); State v. Milligan, 170 Mo. 215, 70 S. W. 473 (475); State v. McCarver, 194 Mo. 717, 92 S. W. 684.

3—Montgomery v. Mo. Pac. Ry. Co., 181 Mo. 477, 79 S. W. 930 (934). Similar instructions have been repeatedly approved in Missouri, although it omits the word "knowingly" swearing falsely on the part of a witness, who willfully swears falsely and it would seem that such witness' testimony may be wholly disregarded by the jury, whereas the rule in some jurisdictions is that such testimony should only be disregarded in so far as the same is not corroborated by other credible evidence or by facts and circumstances in evidence in the case.

4—Miller v. People, 39 Ill. 458; Bowers v. People, 74 Ill. 418; O'Rourke v. O'Rourke, 43 Mich. 58, 4 N. W. 58.

5—Johnson v. State, 34 Neb. 257, 51 N. W. 835 (836).

The court said: "By this instruction, the court stated a well-recognized rule, and the fact that it is applicable to a limited number of witnesses in this case will not make it an exception to the rule."

(c) The court instructs the jury that they are the sole judges of the weight of testimony of any witness who has testified before them in this case at bar, and that, in ascertaining such weight, they have the right to take into consideration the credibility of such witness, as disclosed from his evidence, his manner of testifying and demeanor upon the witness stand, and his apparent interest, if any, in the result of the case. And, if the jury believe that any witness has testified falsely as to any material fact, they have a right to disregard all the testimony of such witness so testifying falsely, or to give his testimony, or any part thereof, such weight only as the same, in their opinion, may be entitled to.[6]

(d) You are further instructed that you are judges of the credibility that ought to be given to the testimony of the different witnesses, and you are not bound to believe anything to be a fact because a witness has stated it to be so, provided you believe from all the evidence that such witness is mistaken, or has knowingly testified falsely.[7]

§ 343. **Palpably False Testimony May Be Disregarded.** It is the duty of the jury in passing upon the credibility of the testimony of the several witnesses to reconcile all the different parts of the testimony if possible. It is only in cases where it is palpable that the witness has deliberately and intentionally testified falsely as to some material matter, and is not corroborated by other credible evidence, that the jury is warranted in disregarding his entire testimony. Although a witness may be mistaken as to some part of his evidence, it does not follow as a matter of law that he has willfully told an untruth, or that the jury would have the right to reject his entire testimony. It is the duty of the jury to consider carefully all the testimony in the case bearing upon the issues of fact submitted to them, and, if possible, to reconcile any and all apparently conflicting statements of the witnesses.[8]

6—State v. Staley, 45 W. Va. 792, 32 S. E. 198 (199).

7—State v. Fenton, 30 Wash. 325, 70 Pac. 741 (743).

8—N. C. St. R. Co. v. Fitzgibbons, 79 Ill. App. 632 (636), aff. 180 Ill. 461 (468), 54 N. E. 483.

"The only objection urged to this instruction is that it omits the word 'credible' as qualifying the corroborating evidence. It is true that the instruction is usually given in the form contended for, i. e., the condition is usually stated as 'not corroborated by other credible evidence.' But we are not prepared to hold that the instruction is bad as given; nor that it would be likely to mislead the jury. The precise form here used in this particular has the approval of text book authority. Sackett Inst. Juries, sec. 7, p. 35 (2nd ed.) An instruction was approved which told the jury that they might disregard the entire testimony of a witness if they believed that he had willfully sworn falsely, etc., 'unless corroborated by other unimpeached testimony.' Bowers v. People, 74 Ill. 418. 'When a witness contradicts himself in a material part of his evidence, and should he do so willfully and for the purpose of concealing the truth, he would be unworthy of belief, except so far only as he might be supported by other evidence in the case.' Crabtree v. Hagenbaugh, 25 Ill. 233, 79 Am. Dec. 324."

But see W. C. St. Ry. Co v. Moras, 111 Ill. App. 531, where Judge Ball held that the use of the word

§ 344. **Falsus in Uno, Falsus in Omnibus.** (a) If you should find that any witness in this case has willfully testified falsely to any material fact in the case, then you have the right to disregard the whole of such witness' testimony, if you decide so to do.[9]

(b) If the jury believe that any witness in this case has knowingly sworn falsely to any material matter in this case, then you are instructed that this would justify you in disregarding the testimony of such witness entirely.[10]

(c) If the jury believes that any witness has willfully sworn falsely to any material fact in the case, you are at liberty to reject as untrue the whole or any part of the testimony of such witness.[11]

(d) If the circumstances respecting which testimony is discordant, be immaterial, and of such a nature that mistakes may easily exist, and be accounted for in a manner consistent with the utmost good faith and probability, there is much reason for indulging the belief that the discrepancies arise from the infirmity of the mind, rather than from deliberate error. If, however, a witness, with intent to deceive, falsely testifies as to a material fact, which the witness

"palpable" was reversible error. Later in C. C. R. Co. v. Shaw, 220 Ill. 532, 77 N. E. 139, the supreme court of Illinois held: "The particular complaint made of this instruction is the use of the word 'palpable,' contained in the second sentence of the instruction. A similar instruction was before this court containing the word here complained of, in the case of N. C. S. R. Co. v. Fitzgibbons, 180 Ill. 466. On page 468 of the opinion it is discussed and held to be an inaccurate expression of the law. In that case the court took the view that the inaccuracy was not of such a character as would mislead the jury or require a reversal of the case."

9—Hurlbut v. Leper, 12 S. Dak. 321, 81 N. W. 631 (632).

"It will be noticed in this instruction that the court carefully qualified it by using the term 'has willfully testified falsely.' As qualified, we see no objection to the instruction as given. In McPherrin v. Jones, 5 N. D. 261, 65 N. W. 685, the court, in commenting upon an instruction given by the lower court, uses the following language: This instruction should have been so qualified as to make it applicable only in the event of the jury believing that the witness has willfully or knowingly testified falsely. The instruction in that case had omitted to state either of these qualifications and, as given to the jury was as follows: If you believe that any witness has testified falsely as to any material fact in the case, you have the right to wholly disregard the testimony of any such witness, except so far as it is corroborated by other credible evidence in the case, either positive or circumstantial. For the error in that instruction the judgment of the court below was reversed."

10—Atkins v. Gladwish, 27 Neb. 841, 44 N. W. 37 (38).

"The maxim, falsus in uno, falsus in omnibus, is one of general acceptation; but there is quite a diversity of opinion in the reported cases as to how it should be expressed in an instruction to a jury. It is not my purpose to compare the instruction above quoted with those which have been approved or disapproved in the courts of other states, but to say that I do not find either the weight of authority or the reason of the case to indispensably require such charge to be qualified by the addition of the words 'unless corroborated.' Indeed if the witness may not be believed unless corroborated, but may not be disbelieved if corroborated, even then credence is given alone to the corroborating testimony, and not to that of the implicated witness."

11—State v. Moore, 156 Mo. 204, 56 S. W. 883 (886).

knows to be absolutely false, then you can apply to the testimony of the witness the maxim, *"Falsus in uno, falsus in omnibus."* If you find that either one of these parties, the complaining witness or the defendant, has falsely and intentionally testified to a material fact in this case, which is not true, that this has been done intentionally, and falsely, knowing it to be untrue, you are at liberty to apply this maxim to such testimony.[12]

§ 345. Duty to Distrust the Entire Testimony When Willfully False in a Material Fact. (a) The court charges you that if any witness examined before you, or whose testimony taken elsewhere has been read to you, has willfully sworn falsely to any material matter, it is your duty to distrust the entire evidence of such witness.[13]

(b) The court charges you that, if any witness examined before you has willfully sworn falsely as to any material matter, it is your duty to distrust the entire evidence of such witness.[14]

(c) The court charged the jury that if they believe from the evidence that B. willfully and intentionally swore that he did not have the conversations with C. and P. as testified by them, then they may discard all that B. testified.[15]

12—State v. Sexton, 10 S. D. 127, 72 N. W. 84 (85).

"Concerning this cautionary instruction counsel for the defendant contend that the court should have added 'unless corroborated by other credible evidence in the cause, or by facts and circumstances proved at the trial.' By the foregoing instruction, the jury were, in effect, cautioned that in the absence of motive and willful intent to deceive, by testifying falsely to a material fact known at the time to be absolutely false, discrepancies, though material, should be attributed to mistake, misapprehension or the infirmity of the mind, and when thus accounted for, the maxim, 'False in one thing, false in all things,' should not be applied. While the credibility of a witness is a matter exclusively for the jury, and a province upon which the court must not trench, a well-guarded advisory instruction relating to the power of a jury to wholly discredit a witness who has knowingly and purposely testified falsely to a material fact is clearly within the exercise of a sound judicial discretion, and well supported by both reason and authority." Minich v. People, 8 Colo. 440, 9 Pac. 12; Fraser v. Haggerty, 86 Mich. 521, 49 N. W. 616; People v. Sprague, 53 Cal. 491; Wilkins v. Earle, 44 N. Y. 172, 4 Am. Rep. 655; People v. Moett, 58 How. Prac. 467; The Santissima Trinidad, 7 Wheat. 283.

"As the language employed in no manner invaded the rights of the jury, but left each member thereof entirely free to deal according to the dictates of conscience, morality and justice with the testimony of the various witnesses, the court did not err by omitting to modify the instruction with the phrase 'unless corroborated by other credible evidence in the cause, or by facts and circumstances proved at the trial.'"

13—People v. Fitzgerald, 138 Cal. 39, 70 Pac. 1014 (1017).

Said the court: "This instruction is substantially according to the Code, which is, 'that a witness false in one part of his testimony is to be distrusted in others.'" Cove Civ. Proc., par. 2061, subd. 3.

14—In People v. Stevens, 141 Cal. 488, 75 Pac. 62 (64), the court held that the above instruction was proper and in substantial accord with the statute (Code Cr. Proc. par. 2061, subd. 3) as construed in People v. Fitzgerald, supra. See, also, People v. Sprague, 53 Cal. 491; People v. Arlington, 131 Cal. 231, 63 Pac. 347.

15—McClellan v. State, 117 Ala. 140, 23 So. 653 (655).

(d) It is the maxim of the law that if a man, who is under oath, testifies falsely in one particular, you would be justified in not believing him in anything.[16]

§ 346. **May Disregard Entire Testimony of a Witness, Who Has Willfully Sworn Falsely, Except in so far as it Has Been Corroborated by Other Credible Evidence.** (a) The jury are instructed that if you believe from the evidence that any witness has willfully sworn falsely on this trial as to any matter or thing material to the issues in the case, then you are at liberty to disregard his entire testimony, except in so far as it has been corroborated by other credible evidence, or by facts and circumstances proved on the trial.[17]

(b) The court instructs the jury that they are the sole judges of the facts in this case and of the credit to be given to the respective witnesses who have testified, and in passing upon the credibility of such witnesses they have a right to take into consideration their prejudices or motives or feelings of revenge, if any such have been proven or shown by the evidence in this case; and if the jury believe, from the evidence, that any witness or witnesses have knowingly or willfully testified falsely as to any material fact or point in this case, the jury are at liberty, unless corroborated by other credible evidence, to disregard the testimony of such witness or witnesses *in toto*.[18]

(c) If you believe that any witness has been successfully impeached, then the testimony of such witness should be discredited, unless it be corroborated by other testimony or circumstances which the jury believe to be true.[19]

(d) If you believe that any witness who has testified in this case has willfully and intentionally testified falsely as to any material matter in the case, the jury have a right to disregard any or all of the testimony of such witness, except in so far as it is corroborated by other credible evidence.[20]

This instruction, said the court, should have been given upon the authority of Grimes v. State, 63 Ala. 166; Childs v. State, 76 Ala. 93; Jordon v. State, 81 Ala. 31, 1 So. 577; Railroad Co. v. Frazier, 93 Ala. 51, 9 So. 303.

16—Creachen v. Carpet Co., 214 Pa. 15, 63 Atl. 195.

17—State v. Waln, — Idaho —, 80 Pac. 221; State v. Burns, 27 Nev. 289, 74 Pac. 983; Bonnie v. Earll, 12 Mont. 241, 29 Pac. 882; Bowers v. People, 74 Ill. 418.

18—Gice v. Crosby, 63 Ill. 190; Gotlieb v. Hartman, 3 Colo. 60; Munich v. People, 8 W. C. R. 588. Held error to refuse this instruction. Gorgo v. People, 100 Ill. App. 130 (131) assault.

19—Hinkle v. State, 94 Ga. 595, 21 S. E. 595 (601).

20—State v. De Wolfe, 29 Mont. 415, 74 Pac. 1084 (1087).

Section 3390, Code Civ. Proc., which is applicable to this case, prescribes that the jury are to be instructed by the court, on all proper occasions, "that a witness false in one part of his testimony is to be distrusted in others." In Cameron v. Wentworth, 23 Mont. 70, 57 Pac. 648, the court said: "It is undoubtedly the rule that, where a witness has willfully sworn falsely as to any material matter upon the trial, the jury is at liberty to discard his entire testimony, except in so far as it has been corroborated by other

(e) If you believe that any witness has willfully testified falsely as to any material fact in the case, you are at liberty to disregard the entire testimony of such witness, except in so far as it may be corroborated by other credible evidence in the case.[21]

(f) If you believe any witness on either side of this case has willfully testified falsely in any material matter, then you have a right to disregard the entire testimony of such witness, unless the witness is corroborated by other credible evidence.[22]

(g) You are the sole judges of the credibility of the witnesses and the weight of their testimony; and, if you believe that any witness in the cause has willfully sworn falsely as to any material fact or matter testified to by such witness, you are at liberty to disregard or treat as untrue the whole or any part of the testimony of such witness.[23]

§ 347. Witness Who Testifies Falsely May Be Distrusted as to All the Testimony. (a) A witness who testifies falsely as to one fact in giving his testimony is to be distrusted in other parts of his testimony. If you find that a witness has deliberately testified falsely in one part of his testimony in this case, you have the right to reject the whole of the testimony of that witness which is not shown by other evidence in the case to be true. I do not intimate to you that any witness in this case has testified falsely, or that any witness has been impeached in his testimony in this case. These are matters exclusively within your province as jurors, and not to be determined by the court.[24]

credible evidence." And again, commenting on section 3390, it is said: "As a statute affecting the province of the jury in weighing evidence, it requires them to view with distrust the testimony of a witness who willfully swears falsely as to a material matter. They must distrust such a witness, and, under their general power of passing upon the credibility to be attached to each witness, they may disregard such testimony entirely, except in so far as it is corroborated by other credible evidence." People v. Durrant, 116 Cal. 179, 48 Pac. 75, 37 L. R. A. 622. The same rule is announced in Bonnie v. Earl, 12 Mont. 239, 29 Pac. 882.

21—Trimble v. Territory,—Ariz. —, 71 Pac. 932 (933).

In comment the court said that "substantially the same form of instruction as is here complained of has been approved in many cases, to wit: Hoge v. People, 117 Ill. 45, 6 N. E. 796; Pierce v. State, 53 Ga. 365; State v. Kellerman, 14 Kan. 111; Mead v. McGraw, 19 Ohio St. 55; Jones v. People, 2 Colo. 351; State v. Freiderich, 4 Wash. 204, 29 Pac. 1055, 30 Pac. 328, 31 Pac. 332; Cameron v. Wentworth, 23 Mont. 70, 57 Pac. 648; Faulkner v. Territory, 6 N. M. 464, 30 Pac. 905."

22—Rio Grande W. Ry. Co. v. Utah Nursery Co. et al., 25 Utah 187, 70 Pac. 859 (860).

23—State v. Harper, 149 Mo. 514, 51 S. W. 89 (91-2).

24—People v. Dobbins, 138 Cal. 694, 72 Pac. 339 (341).

The court said "the provision of the Code upon which this instruction is based is, 'that a witness false in one part of his testimony is to be distrusted in others.' Code Civ. Proc. 2061, subd. 3. The first sentence of the instruction is substantially in the language of the Code. In People v. Plyler, 121 Cal. 162, 53 Pac. 553, the court refused to give an instruction which was an accurate amplification and exemplification of the principle of law embraced in the Code provision, and it was said that the court should not have refused the instruction because it was unobjec-

(b) The court instructs you that you are the sole judges of the weight of the evidence and of the credibility of the witnesses, and if you believe from the evidence that any witness has willfully sworn falsely as to any material fact in this case, you may unless the same is corroborated by other credible evidence, or facts and circumstances in evidence, disregard the whole or any part of the testimony of such witness; and in passing on the credibility of any witness or the weight to be given to his testimony, you may consider his manner and conduct upon the stand, his means of knowledge, the relationship of the parties, if any, and the interest that he may have in the result of the case.[25]

(c) Testimony has been introduced to impeach certain witnesses in this case, tending to show that their reputation for truth and veracity is bad. Testimony has also been introduced tending to sustain their reputation for truth and veracity, and their general moral character. You are to consider such testimony as bearing on the credibility of such witnesses, but you should not, for such reason alone, disregard their testimony, especially in those particulars, if any, where they are corroborated by other credible witnesses, or by facts and circumstances proven by the evidence in the case. You are to consider all their testimony in the light of and in connection with, all the other evidence and circumstances disclosed in the case, and give to the evidence of said witnesses such credibility as you may deem it entitled to receive.[26]

(d) The jury are the sole judges of the weight of the evidence and the credibility of witnesses. And, in passing upon the weight to be given to any witness' testimony, the jury may consider the manner and deportment of the witness upon the stand, his means of knowing the facts of which he testifies, the interest, if any, he manifests, the interest, if any, he has in the result of the trial, his relationship, if any, to any party interested in the result of the trial, the probability or improbability of his testimony being true, and other matters that, in the nature of things, would add to or detract from the value of such witness' testimony. And, if you believe that any witness has willfully testified falsely to any material matter in this case, you should disregard such false testimony, and you are at

tionable in point of law, and because the terse language of our statute, well understood by jurists, might be misleading to the non-professional mind; that the false swearing must be willful, and upon a matter material to the case. But nowhere has it been decided, nor indeed could it with reason be held, that it is error for the court to instruct in the language of our written law. This is substantially what the court here did; and so, while the instruction cannot be commended as a full or clear exposition of the meaning of the section of the Code, still it cannot be said that it was error for the court, in giving the law, to have conformed to the language of the Code, and to have omitted what that Code itself omits."

25—Territory v. Garcia, 12 N. Mex. 871, 75 Pac. 34 (35).

26—State v. Olds, 106 Iowa 110, 76 N. W. 644 (646).

liberty to disregard the whole or any part of the testimony of such witness.[27]

(e) The jury being convinced that the witness has stated what is untrue, not as the result of a mistake or inadvertence, but willfully and with the design to deceive, must treat all of his testimony with distrust and suspicion, and reject all, unless they shall be convinced, notwithstanding the base character of the witness, that he had in other particulars sworn to the truth.[28]

(f) The jury are instructed that they are the sole judges of the credibility of the witnesses and of the weight to be given to their testimony. In determining such credibility and weight, they will take into consideration the character of the witness, his manner on the stand, his interest, if any, in the result of the trial, his relation to or feeling towards the parties to the suit, the probability or improbability of his statements, as well as the facts and circumstances given in evidence. In this connection you are further instructed that if you believe any witness has knowingly sworn falsely to any material fact, you are at liberty to reject all or any portion of such witness' testimony.[29]

§ 348. Intentionally, Corruptly, Willfully and Knowingly Swearing Falsely to a Material Point—Illinois Rule. (a) If the jury believe, from the evidence, that any witness has intentionally, corruptly, willfully and knowingly sworn falsely to any material point in the case, they have the right to reject the entire testimony of such witness or witnesses in matters where their testimony is not corroborated by other credible evidence or facts and circumstances appearing in evidence.[30]

(b) If you believe, from the evidence, that any person who testified in this case has knowingly, corruptly, intentionally and willfully testified falsely as to any matter or thing upon the existence or non-existence of which the right of the plaintiff to recover or the right of the defendant to escape liability depends, or upon the existence or non-existence of which the amount of damages, if any, to be recovered by the plaintiff depends, then you are at

27—State v. Hale, 156 Mo. 102, 56 S. W. 881 (882).

28—People v. Kelly, 146 Cal. 119, 79 Pac. 846 (848).

29—Nat. T. W. Co. v. Ice Mach. Co. — Mo. —, 98 S. W. 620.

30—C. C. Ry. Co. v. Olis, 192 Ill. 514 (516), 61 N. E. 459.

The court said, it was unable to agree with counsel that the word "corruptly" referred to the motive of the witness in that connection rather than to the means by which his testimony is obtained. "Objection was made to the use of the words 'any witness' has intentionally, corruptly and knowingly sworn falsely,' etc. It is conceded that 'intentionally' is synonymous with 'willfully,' but objection was made that the use of the word 'corruptly' was equivalent to saying to the jury that, although they should believe from the evidence that any witness had intentionally, willfully and knowingly sworn falsely to any material point in the case, they yet had no right to reject his testimony unless they should also believe from the evidence that such witness had been bribed or was to receive some sort of reward or gain."

liberty to entirely disregard the testimony of such person, except in so far as it may have been corroborated by other credible evidence in the case or by facts and circumstances shown by the evidence in the case.

(c) The court instructs the jury that if you believe, from the evidence in the case, that any witness has willfully, corruptly, intentionally and knowingly testified falsely as to any material matter in the case, then you are at liberty to disregard the testimony of such witness entirely, except wherein it is corroborated by other credible evidence in the case, or facts and circumstances in evidence.[31]

(d) It is only in cases where a witness has willfully and corruptly testified falsely as to some material matter, and is not corroborated by other credible evidence, that the jury is warranted in disregarding his or her testimony. Although a witness may be mistaken as to some part of his or her evidence, it does not follow as a matter of law, that he or she has willfully told an untruth or that the jury would have the right to reject his or her entire testimony.[32]

§ 349. Knowingly and Willfully Swearing Falsely. (a) If the jury believe, from the evidence, that any witness in this case has knowingly and willfully sworn falsely on this trial to any matter material to the issue in this case, then the jury are at liberty to disregard the entire testimony of such witness, except in so far as it has been corroborated by other credible evidence or by facts and circumstances proved on the trial.[33]

31—In C. St. Ry. Co. v. Woodruff, 192 Ill. 544-45, 61 N. E. 461 the court said of forms "b" and "c" "The contention is, the court erred in modifying the instruction by the insertion of the word 'corruptly.' In C. C. R. R. Co. v. Olis, 192 Ill. 514, 61 N. E. 459, the precise question was presented for decision. On the authority of the decision in that cause, and for the reason given in the opinion filed in that case, the judgment of the Appellate Court is affirmed."

32—Hanchett v. Haas, 219 Ill. 549, 76 N. E. 845.

"The objection to this instruction is, that it uses the words 'willfully and corruptly,' whereas it is said, 'if a witness has either willfully or corruptly testified falsely,' etc., the jury may disregard his or her testimony. It is well settled that it is not enough that a witness may have testified falsely to justify the jury in ignoring his evidence, because he may have done so through mistake. The exact question here raised has never been passed upon by this court, but we are clearly of the opinion that the criticism is without force. The instruction would, we think, have been good if it had used only the word 'willfully,' but the addition of the word 'corruptly' did not make it bad. If a witness swears willfully falsely, he must have done so corruptly. In order to justify a jury in disregarding the testimony of a witness it must first appear that such testimony is false, and then if the jury believe that it was willfully so they may disregard it, except in so far as corroborated. The instruction as given could not have misled the jury to the prejudice of the defendant."

33—United Breweries Co. v. O'Donnell, 221 Ill. 334 (338), 77 N. E. 547.

"It is not denied that this instruction lays down the rule in conformity with many decisions of this court, but it seems to be

(b) It is claimed in this case, gentlemen, that some of the witnesses have testified falsely. If you find that any witness has knowingly and willfully testified falsely, as to any material fact, you may reject all of the testimony as you may find not to be corroborated by other credible evidence, or by facts and circumstances that may fairly be inferred therefrom.[34]

(c) If the jury believe, from all the evidence in the case, that any material witness or witnesses have willfully sworn falsely to any material fact in this case, the jury may disregard the testimony of such witness or witnesses as far as the jury may believe it false.[35]

§ 350. Willfully and Knowingly Exaggerating. (a) The jury are instructed that it is a principle of law that if you believe, from the

thought that it is in conflict with the later cases of Chicago and Alton Railroad Co. v. Kelly, 210 Ill. 449, Dunn v. Crichfield, 214 id. 292, Rep. and Tri-City Railway Co. v. Gould, 217 id. 317. Rep. This is a misapprehension. In the Kelly case an instruction informed the jury that they could disregard the entire testimony of a witness 'except in so far as it may have been corroborated by other credible evidence which they do believe, or by facts and circumstances proved on the trial.' In the Dunn case the instruction was to the effect that they could disregard the testimony of a person 'except in so far as it may have been corroborated by evidence in the case which you do believe to be true,' etc. And the one in the Tri-City Railway case was wholly unlike the one here objected to. In the first two cases the instructions were condemned because of the words 'which you do believe.' In the Kelly case we said: 'It has been repeatedly announced as the law of this State, that the jury are at liberty to disregard the evidence of a witness who upon the trial has willfully sworn falsely to a material fact, except in so far as such witness has been corroborated by other credible evidence or by facts and circumstances proven upon the trial.' This language is not variant in any substantial respect from that of the instruction criticised. To the same effect are Cicero and Proviso Street Railway Co. v. Brown, 193 Ill. 274, 61 N. E. 1093; Hoge v. People, 117 id. 35, 6 N. E. 796, and Bevelot v. Lestrade, 153 id. 625, 38 N. E. 1056.

See also, Pierce v. State, 53 Ga. 365; State v. Kellerman, 14 Kan. 111; Mead v. McGraw, 19 Ohio St. 55 (but see Jones v. The People, 2 Colo. 359); Hoge v. People, 117 Ill. 35, 6 N. E. 796; Kerr v. Hodge, 39 Ill. App. 546 (552).

This instruction is expressed in language which was approved of by this court. While it may be true that the instruction had no just application to the testimony of the witnesses of either party, yet there was some conflict in the evidence, and as the instruction was 'the assertion of what was supposed to be a mere abstract principle of law,' it could not have prejudiced the cause of the defendant. Reynolds v. Greenbaum, 80 Ill. 416."

This instruction has no more application to the testimony of defendant's witnesses than to that of plaintiff's witnesses. It is not faulty in that it does not mention the names of any witness. The practice of singling out witnesses in instructions of this character is justly subject to criticism. Phoenix Ins. Co. v. La Pointe, 118 Ill. 384, 8 N. E. 353; City of Sandwich v. Dolan, 141 Ill. 430 (435), 31 N. E. 416; Strehmann v. City of Chicago, 93 Ill. App. 206 (209); Village of Wilmette v. Brachle, 110 Ill. App. 356; W. Chi. R. R. Co. v. Lieserowitz, 197 Ill. 607 (617), affg. 99 Ill. App. 591, 64 N. E. 718.

34—Colbert v. State, 125 Wis. 423, 104 N. W. 61.

35—St. L. P. & N. R. R. Co. v. Rawley, 106 Ill. App. 550.

The court said: "The omission of the qualifying clause where corroborated by other testimony of other credible witnesses is not fatal to an instruction worded as the one under consideration. If it had said that the testimony of a

evidence, that any witness has willfully and knowingly sworn falsely to any material element in the case, or that any witness has willfully and knowingly exaggerated any material fact or circumstance for the purpose of deceiving, misleading or imposing upon the jury, then the jury have a right to reject the entire testimony of such witness unless corroborated by other credible evidence, or by facts and circumstances appearing in evidence in the case.[36]

(b) The court instructs the jury that it is a principle of law that if you believe, from the evidence, that any witness has willfully or knowingly sworn falsely to any material element of the case, or that any witness has willfully and knowingly exaggerated any fact or circumstance material to the issues in the case, for the purpose of deceiving, misleading or imposing upon the jury, either as to the origin of plaintiff's alleged ailments, so far as, from all the evidence, you believe they exist, or as to the nature and extent of the alleged injury or as to the manner of the alleged accident in question, then the jury have a right to reject the entire testimony of such witness, except in so far as corroborated by other evidence which you believe or by facts and circumstances appearing in the case.[37]

(c) The court instructs the jury that, if they believe, from the evidence, that any witness has willfully and deliberately testified falsely to any material fact in this case, then the jury may entirely disregard all the evidence of such witness, except in so far as he may be corroborated by other credible evidence or by circumstances and facts as shown by the credible evidence in the case.[38]

witness who had willfully sworn falsely to any material point in controversy could be entirely disregarded, the case of Goeing v. Outhouse, 95 Ill. 347, cited by appellant, would apply. What it does say is, that if the jury believe that any witness or witnesses have willfully sworn falsely to any material fact, the jury may disregard the testimony of such witness or witnesses, so far as the jury believe it to be false. This is the duty of a jury, and the instruction is not misleading."

36—C. C. Ry. Co. v. Olis, 192 Ill. 514 (517), 61 N. E. 459.

37—Chicago City Ry. Co. v. Shaw, 220 Ill. 532 (535, 536), 77 N. E. 139.

38—N. C. St. R. R. Co. v. Shreve, 171 Ill. 438 (441), affg. 70 Ill. App. 666, 49 N. E. 534.

CHAPTER XVIII.

PREPONDERANCE OF EVIDENCE AND BURDEN OF PROOF.

See Erroneous Instructions, same chapter head, Vol. III.

§ 351. Preponderance of Evidence Explained. (a) The law in this case, and indeed in every case, is that a party coming into a court of justice must satisfy the jury by what is called a fair preponderance of evidence as to the justice of his claim. What we mean by the fair preponderance of evidence is this: Preponderance refers to something that may be weighed. Of course, we cannot get a pair of scales, and by some arbitrary method put on one side the testimony of the plaintiff and on the other side the testimony of the defendant and say which one outweighs the other, or whether it is evenly balanced, but you are to try to do that mentally as far as possible.

The law says that unless the plaintiff satisfies you throughout the entire case of the correctness of his story to such an extent that it outweighs the proof of the defendants, he cannot recover. In other words, if the testimony is evenly balanced, it shows that there is some doubt in your mind; that it is not sufficient; that is, if the testimony of the plaintiff weighs just the same as that of the defendant you must find for the defendant, that is the law. The plaintiff can only recover where his testimony outweighs that of the defendant.[1]

1—Roberge v. Bonner, et al., 185 N. Y. 265, 77 N. E. 1023.

"More might be quoted from this charge to show that the trial court most cogently and clearly impressed upon the minds of the jury their duty to weigh the evidence of the respective litigants, and that their verdict must follow the preponderance of the evidence."

(b) Preponderance, of course, means the most weight; but it is an abstract idea to talk about weighing the testimony between two such men as these parties. I can tell you a sure test as to where the weight of testimony is in this case: it is just what you believe the truth to be.[2]

(c) To determine the question in this case by the preponderance of the evidence is meant that you are to put all the evidence of the plaintiff on one side of the scale, all the evidence in favor of the defendant on the other side of the scale, and whichever side makes down weight had the preponderance of the evidence. Now, evidence is what convinces a man of the truth. If a witness swears to something you do not believe to be true, that is testimony, and not evidence. If a witness says something you are satisfied, in your sound judgment, is not the truth, then you are entitled to disregard it; and it is for you to determine how much weight shall be given to testimony of any witness. It is for you to determine, in case of a conflict of evidence, what witness tells the truth, and where the truth lies. You are not to determine it arbitrarily or through prejudice, but weigh it over carefully and consider it carefully, and take into consideration all the circumstances,—all the evidence in the case; and then it is for you to determine what the truth is, and how much weight, or how little, you should give to any witness. But there may be one other point, perhaps, that some of the jurors have in their mind. I told you in criminal cases the rule was, in order to find a man guilty, you must find beyond a reasonable doubt; but this is different from a criminal action. This is a civil action, and in this case you are only to be satisfied from the preponderance of the evidence.[3]

§ 352. **Preponderance of Evidence Sufficient.** (a) It is incumbent upon the plaintiff to establish this allegation by a preponderance of the evidence before he can recover; and if you find that this allegation has been established by a preponderance of evidence, then the plaintiff is entitled to recover the amount claimed by him.[4]

(b) The jury are further instructed that it does not necessarily follow that a plaintiff has failed to establish his case by a preponderance of proof because he has testified to a state of facts which

2—Thomas v. Paul, 87 Wis. 604, 58 N. W. 1031. "This instruction is substantially correct. Preponderance means the most weight. It is as correct a definition as can be given, and the jury are instructed that, to entitle the plaintiff to recover, there must be the most weight, or the preponderance of the evidence, that the defendant made the promise. The obvious inaccuracy, that the belief of the jury that the defendant made the promise is evidence of the preponderance of the evidence in favor of it, instead of making the preponderance of the evidence the cause of their belief could not have misled the jury."

3—Knopke v. Germantown Farmers' Mut. Ins. Co., 99 Wis. 289, 74 N. W. 795. The court said: "While the charge is not exactly a model in all respects, we discover no reversible error in it."

4—Mefford v. Sell, — Neb. —, 92 N. W. 148.

are denied by the testimony of the defendant. In such a case, in arriving at the truth, the jury have a right to take into consideration every fact and circumstance proven on the trial, such as the situation of the parties, acts at the time of the transaction and afterwards, so far as they appear in evidence; their statements to others, if any proven, in relation to the matters in question, as well as their statements to each other,—as well as their appearance on the witness stand, and their manner of testifying in the case.[5]

(c) If you find that the plaintiff has proved his case as laid in the declaration, or any count thereof, by a preponderance of the evidence, then you should find the defendant guilty.[6]

(d) That in this action, the plaintiff is only required to make out his case, by a preponderance of evidence, to entitle him to recover; and any of the evidence in the case, either circumstantial or positive

5—Grand Island Mercantile Co. v. McMeans, 60 Neb. 373, 83 N. W. 172. Of this instruction the court said: "This portion of the charge was not, as suggested by counsel, in disparagement of the testimony of defendant, nor did it tend to strengthen that of plaintiff. It is true that he did not fail to make out his case by a preponderance of the evidence merely because his testimony in every essential matter was contradicted by that adduced by his adversary. The preponderance of the evidence is not determined by such a rule. Many matters enter into the solution of the question, as the jury were properly advised by the court below. The instruction did not, as urged in argument, compare the testimony of any witness or party with that of another witness or party. Argabright v. State, 49 Neb. 760, 69 N. W. 102, cited by the defendant, is inapplicable here. There the trial court, in its instructions, specifically named certain witnesses for the defense, and cautioned the jury that, if they had testified falsely as to any material matters, their testimony should be wholly rejected, where uncorroborated by other credible evidence. Manifestly, it was error to so advise the jury. But no instruction of that import was given in the case at bar." See also Allen-West C. Co. v. Hudgins & Bro., 74 Ark 468, 86 S. W. 289.

6—Mt. Olive C. Co. v. Rademacher, 190 Ill. 538, 60 N. E. 888. "The instruction, which tells the jury that, if they believe from the evidence, that the plaintiff has proved his or her case as laid in his or her declaration, or either count thereof, then they will find the issues for the plaintiff, has been held by this court to be unobjectionable in a number of cases." Penna. Co. v. Marshall, 119 Ill. 399; Chi. C. Ry. Co. v. Hastings, 136 id. 251, 26 N. E. 594; Ohio & Mississippi Ry. Co. v. Porter, 92 id. 437; Race v. Oldridge, 90 id. 250, 32 Am. Rep. 27; Logg v. People, 92 id. 598.

In C. & E. I. R. R. Co. v. Filler, 195 Ill. 9, 62 N. E. 919, the court said: "The instruction was not erroneous as submitting the case upon the whole of the declaration, because, by the express terms of the instruction, the recovery could be under any one count of the declaration. Upon this subject, the Appellate Court correctly say: 'We think there was evidence tending to sustain both the first and third counts of the declaration, and that there was no error in giving the instruction.' See also N. C. St. R. R. Co. v. Polkey, 203 Ill. 225 (231), 67 N. E. 793 where the court said on a similar instruction: It is not error to give an instruction of this character authorizing a recovery upon proof of the case stated in the declaration, where the counts each state a cause of action and there is evidence tending to sustain them. Mt. Olive Coal Co. v. Rademacher, 190 Ill. 538, 60 N. E. 888; Central Ry. Co. v. Bannister, 195 Ill. 48, 62 N. E. 864. In this case, there was at least one count which there was no evidence tending to prove, and the giving was held erroneous."

and direct, which tends to produce belief in the mind of the jury, is proper to be considered by them, in determining whether or not the defendant is guilty.[7]

(e) The plaintiffs must satisfy the jury by a preponderance of the evidence, that the contract relied upon by them, is the true contract, and unless this is done, the defendant is entitled to a judgment at their hands.[8]

(f) The court instructs you that in order to prove against one the charge of assault and battery, it is necessary to establish by a preponderance of the evidence an assaulting and beating with a willful intent to injure another, proof of carelessness or negligence is not sufficient and does not constitute proof of assault and battery.[9]

7—Miller v. Balthasser, 78 Ill. 302.

8—Behrman et al. v. Newton, 103 Ala. 525, 15 So. 838 (839).

"Jury cannot be reasonably satisfied of the existence of a disputed fact, unless there is a preponderance of the evidence in its favor. In Acklen v. Hickman, 60 Ala. 568, 35 Am. Dec. 54, it was held that the preponderance, unless it reasonably satisfied the minds of the jury is not enough; and in the case of Vandeventer v. Ford, 60 Ala. 610, the rule was laid down that a charge should not be given which instructed the jury that they should base their verdict upon a mere preponderance of the evidence. In Rowe v. Baber, 93 Ala. 422, 8 South 865, it is said that the true rule is that, to justify a verdict the evidence must reasonably satisfy the minds of the jury that the facts exist upon which their verdict is based. In Carson v. Porter (K. C.) 22 Mo. App. 179 the court objected to the instruction because it required the plaintiff to produce a preponderance of the evidence to show he was an innocent indorsee of a promissory note, when the law only required a rebuttal of the prima facie case in favor of the defendant arising from the proof adduced that the note was procured by fraudulent representations on the part of the payee. None of the foregoing cases held or suggested that it is reversible error in every case to use the words in question in instructing the jury, while the contrary has been ruled several times. A jury will always gather the true import of the expression, unless it is used in a misleading context, and that it was so used must plainly appear to authorize a reversal. Milligan v. Railway Co. (K. C.) 79 Mo. App. 393; Milling Co. v. Walsh, 37 Mo. App. 567; and in Steinkamper v. McManus, 26 Mo. App. 51, this court held the use of the phrase without explanation will not justify a reversal, and we think those rulings were intelligent and just." Jones v. Durham, 94 Mo. 51, 67 S. W. 976 (977).

9—Solomon v. Buechele, 119 Ill. App. 595 (598-602).

"The appellant strenuously insisted that this instruction was erroneous. Because assault and battery is an offense under the criminal law of Illinois, he says that its perpetration must, even in a civil action, be proved beyond a reasonable doubt before one charged with it can be legally held liable. If this be so, the modified instruction was prejudicially erroneous." The court said that, the rule contended for by appellant, "if it did not have its origin altogether in actions of slander and libel, where it was applied to charges of crime made in pleas of justification, has found its chief expression in such cases. 2 Greenleaf on Evidence, sec. 426. To whatever extent it goes, it may be called the English rule. The weight of American authority outside of Illinois is to the contrary and supports the doctrine that in civil cases the commission of any crime directly in issue may be determined by the preponderance of the evidence. Reynold's Stephen's Digest of the Law of Evidence, Article 94; 2 Wharton on Evidence, sec. 1246, and cases cited. In Illinois, however, in a series of cases beginning with Crandall v. Dawson, 1 Gilman, 556, the English rule has been applied to charges

§ 353. Preponderance—Methods of Determining. (a) The jury are instructed that the preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of evidence is, the jury should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements, in view of all the other evidence, facts and circumstances proved on the trial, and from all these circumstances determine upon which side is the weight or preponderance of the evidence.[10]

(b) In determining upon which side the preponderance of the evidence is, the jury should take into consideration the opportunities of the several witnesses for knowing the things about which they testify, their conduct and demeanor while testifying, their interest, or lack of interest, if any, in the result of the suit, the probability or improbability of the truth of their several statements in view of all the other evidence, facts and circumstances proved on the trial, and, from all these circumstances determine upon which side is the weight or preponderance of the evidence.[11]

(c) The court instructs you that, in determining where the weight

of infamous crimes made in pleas of justification in slander suits. In Crandall v. Dawson the charge in the pleas of justification was perjury. So, too, in Darling v. Banks, 14 Ill. 46. In Crotty v. Morrissey, 40 Ill. 477, it was grand larceny. In Harrison v. Shook, 41 Ill. 141, again it was perjury. These it will be observed, are crimes which are both felonious and infamous. Starr & Curtis Statutes, chapter 38, sec. 458. Citing also: Sprague v. Dodge, 48 Ill. 142; Germania Ins. Co. v. Klewer, 129 Ill. 599; Grimes v. Hilliary, 150 Ill. 141, 36 N. E. 977; First National Bank v. Sanford, 83 Ill. App. 62."

10—Pfaffenback v. L. S. & M. S. Ry. Co., 142 Ind. 246, 41 N. E. Rep. 530 (530-531). "As we understand the instruction, the objection made is not tenable. It combines the two rules that the burden rests upon the plaintiff to establish his cause of action by a preponderance of the evidence (not of the circumstances), and, in ascertaining where the preponderance of the evidence (not circumstances) lies, the jury should pass upon the credibility of the witnesses, considering the tests given, in view of all the other evidence, facts and circumstances proved on the trial, and, from all these circumstances, determine upon which side is the weight or preponderance of the evidence (not circumstances). There is no affirmative limitation upon the duty of the jury to consider the evidence, in considering the two rules mentioned. Nor is there implied from the phrase from all these circumstances that the evidence should not supply a proper basis of consideration."

11—Chi. U. Tr. Co. v. Yarus, 221 Ill. 641, 77 N. E. 1129; "It is urged," said the court, "that the effect of the word 'should' in said instruction was to peremptorily instruct the jury that it should consider only the elements there outlined in determining the question from its consideration the element of the number of witnesses, and that it should have been stated in a permissive, rather than in a peremptory, manner. In the case of Meyer v. Mead, 83 Ill. 19, the word 'must' was used where 'should' appears in the instruction under discussion, and the giving of said instruction was approved by this court. And in Illinois Steel Co. v. Ryska, 102 Ill. App. 347, the point

or preponderance of the evidence lies in this case, you have a right to take into consideration all the facts and circumstances in evidence, together with the conduct of the parties to this suit with reference to said controversy, so far as the same has been shown by the evidence.[12]

§ 354. **Preponderance—Number of Witnesses Proper Elements to be Considered.** (a) The jury are instructed that the fact that the number of witnesses testifying on one side is larger than the number testifying on the other side, does not necessarily alone determine that the preponderance of evidence is on the side for which the larger number testified. In order to determine that question, the jury must be moved by and take into consideration the appearance and conduct of the witnesses while testifying; their apparent intelligence or the lack of it, their opportunity of knowing or seeing the facts or subjects concerning which they have testified, or the absence of such opportunity; their interest or the absence of interest in the result of the case, and from all these facts as shown by the evidence, and from all the other facts and circumstances so shown, the jury must decide on which side is the preponderance.

After fairly and impartially considering and weighing all the evidence in this case, as herein suggested, the jury are at liberty to decide that the preponderance of evidence is on the side which in their better judgment is sustained by the more intelligent, the better informed, the more credible and the more disinterested witnesses, whether these are the greater or the smaller number. But the jury have no right to disregard capriciously the testimony of the larger number of witnesses nor to refuse to give whatever consideration in their judgment should attach naturally to the fact that the larger number testified one way. The element of numbers should be considered with all the other elements already herein suggested for whatever in the judgment of the jury that element is worth, and the evidence of the smaller number cannot be taken by the jury in preference to that of the larger number unless the jury can say, on their oaths, that it is more reasonable, more truthful, more disinterested and more creditable.[13]

(b) The jury are further instructed that, while the preponderance of evidence does not consist wholly in the greater number of witnesses testifying the one way or the other, yet the number of credible and disinterested witnesses testifying on the one side or the other of a disputed point is a proper element for the jury to consider in determining where lies the preponderance of the evidence.[14]

here presented was made on an instruction identical with the one here under consideration, and the court held the objection was not well taken, and this court affirmed such judgment. Ill. Steel Co. v. Ryska, 200 Ill. 280, 65 N. E. 734. It was not error to give said instruction."

12—Ingram v. Reiman, 81 Ill. App. 123.

13—Gage v. Eddy, 179 Ill. 492 (503), 53 N. E. 1008.

14—W. C. R. R. Co. v. Lieserowitz, 197 Ill. 607 (612), affg. 90 Ill. App. 591, 64 N. E. 718.

§ 355. Preponderance—Does Not Necessarily Depend on Number of Witnesses. (a) You are not to be governed by the number of witnesses, but by the weight and preponderance of the evidence.[15]

(b) The plaintiff must prove his cause by the preponderance of the testimony, by the greater weight of the evidence. That does not necessarily mean a greater number of witnesses who testify on any side of the issue or issues involved in any case, but according to the weight you give to the testimony of each witness.[16]

(c) The preponderance of evidence does not depend upon the number of witnesses, and does not mean the greater number of witnesses. It does depend upon the weight of evidence, and means the greater weight of the evidence.[17]

(d) The preponderance of the evidence does not mean that he must produce before you the greater number of witnesses, but that the testimony of the witnesses he does produce must carry greater weight with you—have more convincing force—than the other. In other words, if the testimony is, in your judgment, evenly balanced, your verdict must be for the defendant, because the plaintiff must establish his case by a preponderance of the evidence.[18]

15—Birmingham Ry. & E. Co. v. Ellard, 135 Ala. 433, 33 So. 276 (281).

16—Bedenbaugh v. Southern Ry. Co., 69 S. C. 1, 48 S. E. 53 (55).

17—Indianapolis St. Ry. Co. v. Johnson, 72 N. E. 573, 574. Comment of the court: "The appellant criticises this for the reason asserted that it does not state the law correctly, and was an invasion of the province of the jury. They assert that, when the witnesses are equally credible in respect to their character, the preponderance of the evidence does depend upon the number of witnesses, and that the preponderance thereof is necessarily determined by the greater number of witnesses. As a general rule, the preponderance of the evidence in a case does not depend upon or mean the greater number of witnesses testifying upon the matter or matters in issue. Counsel mistake the law in their contention, that, where the witnesses in the case are equally credible in respect to their character, then in such a case the preponderance of the evidence depends upon the number of witnesses testifying. This certainly is not the true test in any case. Any number of witnesses may be of equal credibility, and possess equal information, and still differ greatly in the amount or weight of their evidence. The authorities generally affirm that the number of witnesses are not to be counted by the jury or court trying the case in order to determine upon which side is the preponderance, but the evidence given by them is to be weighed, and the preponderance thereof does not depend on the greater number of witnesses in the particular case, citing Wray, Adm'r v. Tindall, 45 Ind. 517; Howlett v. Dilts, 4 Ind. App. 23, 30 N. E. 313; Bierbach v. Goodyear, etc., Co., 54 Wis. 208, 11 N. W. 514, 41 Am. Rep. 19; Ennis v. Dudley (City Ct. N. Y.) 48 N. Y. Sup. 622; 3 Jones on Evidence, 902; Savanah, etc., R. Co. v. Wideman, 99 Ga. 245, 25 S. E. 400; Village of N. Alton v. Dorsett, 59 Ill. App. 612; Bishop v. Busse, 69 Ill. 403. In Bouvier's Law Dict. vol. 2, p. 730, preponderance of evidence is defined to be the greater weight of evidence or evidence which is more credible and convincing to the mind. Citing Button v. Metcalf, 80 Wis. 193, 49 N. W. 809. The instruction in question is not open to the objections urged by counsel for appellant. If not as full and explicit under the circumstances as desired, they should have tendered and requested an instruction expressing their views of the law on the question involved."

18—Hale v. Knapp, 134 Mich. 622, 96 N. W. 1060 (1961).

(e) The jury are instructed, that the preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact, or state of facts. In determining upon which side the preponderance of the evidence is, the jury should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest, if any, in the result of the suit, the probability or improbability of the truth of their several statements, in view of all the other evidence, facts and circumstances proved on the trial; and from all these circumstances determine upon which side is the weight or preponderance of the evidence.[19]

(f) By a preponderance of proof, the court does not mean a larger number of witnesses on a given point. Four or five witnesses may testify to a fact and a single witness testify to the contrary, but, under such circumstances and in such manner and with such an air and appearance of truth and candor as to make it more satisfactory or convincing to you that the one witness, with the opportunity knowing the facts testified to, has told the truth of the matter. When you are thus satisfied that the truth lies with a single witness or any other number, you are justified in returning a verdict in accordance therewith. This is what is meant by a preponderance of

19—Mayor v. Mead, 83 Ill. 19; Whittaker v. Parker, 42 Ia. 585; McRae v. Laurence, 75 N. C. 289; Riley v. Butler, 36 Ind. 51. The correctness of the instruction is sustained by this court in the following cases:

"We do not regard this instruction as being open to the criticism that it tells the jury to disregard the number of witnesses in determining the point as to the preponderance of evidence. It does not exclude from the consideration of the jury that element, but impliedly concedes that it is a proper matter for their consideration. Similar instructions have been held not to be erroneous. C. & A. R. R. Co. v. Fisher, 141 Ill. 614-26, 31 N. E. 406."

"It is argued that the instruction contains a direct command made upon the jury to determine on which side is the preponderance of the evidence by taking into consideration certain specific things, viz. first, the opportunity of the several witnesses for seeing and knowing, etc.; second, the conduct and demeanor of the several witnesses while testifying; third, their interest, or lack of interest, in the result of the suit; fourth, the probability or improbability of their truth, in view of the other evidence, etc. We do not think that the instruction is fairly subject to the criticism urged against it." Meyer v. Mead, 83 id. 19; Mitchell v. Hindman, 150 Ill. 538, 37 N. E. 916. "In C. & A. R. R. Co. v. Fisher, supra, the instruction was as follows: 'That the preponderance of evidence may not depend entirely upon the number of witnesses testifying on either side of the case,' and it was there said (p. 626): 'It is urged that this is practically telling the jury that the greater number of witnesses is no better than the less number.' We do not so understand it. It impliedly concedes that, where all other things are equal, the greater number must control. The words 'may' and 'entirely' are both qualifying words." N. C. St. R. R. Co. v. Anderson, 176 Ill. 635, 52 N. E. 21; C. & A. Ry. Co. v. Winters, 65 Ill. App. 435; Eastman v. W. C. St. Ry. Co., 79 Ill. App. 585; W. C. St. R. R. Co. v. Lieserowitz, 99 Ill. App. 591 (593), affd. 197 Ill. 607, 64 N. E. 718; I. S. Co. v. Ryska, 102 Ill. App. 347, affd. 200 Ill. 280, 65 N. E. 734; Miller v. John, 208 Ill. 174 (180); I. S. Co. v. Wierzbicky, 107 Ill. App. 69 (78); C. C. Ry. Co. v. Bundy, 109 Ill. App. 637 (643), aff'd 210 Ill. 36 (47), 71 N. E. 28.

proof. It is that character or measure of evidence which carries conviction to your minds.[20]

(g) You are instructed that the weight of the testimony does not necessarily depend on the greater number of witnesses sworn on either side of a question in dispute, but you are at liberty, as jurors, to consider all the facts and circumstances appearing from the evidence in the case, and determine from that, which of the witnesses are worthy of the greater credit; and if you believe, from the evidence, that the evidence of a small number of witnesses on one side is more credible and trustworthy than the evidence of the greater number on the other side, then the evidence preponderates on the side of the smaller number of witnesses.[21]

§ 356. When the Evidence is Equally Balanced. (a) If, after considering all of the evidence in the case, you shall find that the evidence upon any question is equally balanced, you should answer such question against the party who has the burden of such issues, for in such case there would be no preponderance in favor of such proposition.[22]

(b) If, upon the whole case, the jury are in doubt from the evidence as to whether the defendants are indebted to the plaintiffs, or if the evidence leaves the question evenly balanced as to whether the defendants are indebted to the plaintiffs, then their verdict should be for the defendants.[23]

(c) If the evidence in the case is evenly balanced as between the contention of the plaintiff and that of the defendant, on the material issues, the jury should find the defendant not guilty.[24]

(d) The court instructs the jury, as a matter of law, that the burden of proof is upon the plaintiff, and it is for him to prove his case by a preponderance of the evidence. If you find that the evidence

20—W. C. St. R. R. Co. v. Loftus, 83 Ill. App. 192 (195). "This instruction was criticised because it is claimed it singles out the plaintiff, and tells the jury in substance they may find their verdict on his unsupported testimony. We cannot assent to this contention. The instruction may as well apply to either of appellant's conductors as to plaintiff. In N. C. C. Ry. Co. v. Gastka, 27 Ill. App. 518-23, this instruction was held not to be erroneous, and this decision was affirmed by the Supreme Court, 128 Ill. 613, the court saying: 'The instructions may contain technical inaccuracies, but in the main we regard them as correct. They contain nothing calculated to mislead the jury.'"

21—St. L. & O. F. Ry. Co. v. Union Bank, 209 Ill. 457 (460), 70 N. E. 651.

22—Renard v. Grande, 29 Ind. App. 579, 64 N. E. 644. "The rule prevails that a plaintiff must prove the material averments of his complaint by a fair preponderance of the evidence, and the same rule applies to the defendant as to all matters of affirmative defense. It must logically follow that if upon any material question pleaded, the jury or court should arrive at the conclusion that the evidence is evenly balanced, then the party having the burden of such question must fail, for he had not established it by a preponderance of the evidence. * * * It was not error to so instruct the jury."

23—Allen-West Com. Co. v. Hudgins & Bro., 74 Ark. 468, 86 S. W. 289, 291.

24—Alton L. & T. Co. v. Oller, 119 Ill. App. 181 (189, 190).

bearing upon the plaintiff's case is evenly balanced, or that it preponderates in favor of the defendant, then the plaintiff cannot recover, and you should find for the defendant.[25]

(e) If on any material fact the evidence is equal, so that there is no preponderance, you are not at liberty to find and state that fact in your special verdict.[26]

§ 357. **Fair Preponderance of Evidence.** (a) The court instructs the jury that if you should find from a fair preponderance of evidence that the facts are as stated in the claim of plaintiff just read to you, then she is entitled to recover in this action.[27]

(b) The court instructs the jury that the burden of proof is upon the plaintiff to maintain the issue in this case on his part, by a fair preponderance of evidence as to whether or not the plaintiff was employed by the defendant to perform the services sued for and testified to by the plaintiff; and, unless the jury believe from the evidence that the plaintiff has so maintained the said issue, they will find a verdict for the defendant.[28]

(c) The court instructs the jury that many of the claims of the plaintiff as to just what occurred have been denied by the defendant's witnesses, and you will be called upon to find the facts you believe to be established by the fair weight of all the evidence as embodied in the special verdict submitted to you.[29]

25—Wrigley v. Cornelius, 162 Ill. 92 (95), affg. 61 Ill. App. 279, 44 N. E. 406; Nash v. Cooney, 108 Ill. App. 211 (212); C. C. Ry. Co. v. Osborne, 105 Ill. App. 462 (468).

26—P. C. C. & St. L. Ry. Co. v. Burton, 139 Ind. 357, 37 N. E. 150 (152). In comment the court said: "Appellant insists that this was an error, and that, where the evidence fails to preponderate in favor of an essential fact, the verdict should find expressly the nonexistence of that fact. To this insistence is cited Gulick v. Connely, 42 Ind. 134.

"We do not understand the rule to be as counsel state it, nor do we understand the case cited to have so held. The duty of the court or jury stating the facts specially is not to state the failure of one who assumes the burden of an issue, but the failure to state the existence of the fact is equivalent to finding the non-existence of the fact. A fact not found is a finding that the fact is not proven by a preponderance of the evidence. Coal Co. v. Hoodlet, 129 Ind. 327, 27 N. E. 741, and cases there cited."

27—Sherwood v. Chicago & W. M. Ry. Co., 88 Mich. 108, 50 N. W. 101 (102).

28—Kirchner v. Collins, 152 Mo. 394, 53 S. W. 1081 (1082).

"In this case, most learned counsel have favored us with different constructions to be placed on the word 'fair.' While it is to be avoided, we are not disposed to view it, under the circumstances of this case, as reversible error, and we can find no case where it has been regarded of such weight. On the contrary, it has been expressly ruled insufficient to work a reversal in our sister state of Texas." McBride v. Banguss, 65 Tex. 177; Adams v. Eddy, — Tex. Civ. App. —, 29 S. W. 180; Cabell v. Menczer, — Tex. Civ. App. —, 35 S. W. 206.

29—"The criticism is upon the use of the word 'fair,' but the facts were 'to be established by the fair weight of all the evidence.' The word 'establish' ordinarily means 'to settle firmly; to fix unalterably.' And hence the facts could not be so 'established' except by the greater weight or preponderance of the evidence. Manifestly it was not misleading." Thomas v. Paul, 87 Wis. 607, 58 N. W. 1031;

§ 358. **Slight Preponderance of Evidence Sufficient.** (a) By preponderance of the evidence plaintiff must have in this case, I mean that the testimony when put in as to the claims of the respective parties, the evidence produced by the plaintiff must weigh a little more than that of defendant. It must be enough to push down his side of the scale in order to be a preponderance of the evidence which the law requires he should bring here before you in order to be entitled to recover in this case. Now the verdict is to be found in the manner in which I have indicated, from a preponderance of the evidence.[30]

(b) The court instructs the jury that, while as a matter of law the burden of proof is upon the plaintiff, and it is for him to prove his case by a preponderance of the evidence, still, if the jury find that the evidence bearing upon the plaintiff's case preponderates in his favor although but slightly, it would be sufficient for the jury to find the issues in his favor, and to find a verdict against the defendant.[31]

(c) The jury are instructed that if the evidence more than satisfies you that the claim of the claimant is valid, than there is on the other side, taking everything into consideration, you will find for the claimant; if there is not, you will find for the estate.[32]

§ 359. **"Burden of Proof" and "Preponderance of Evidence" Explained.** (a) The court instructs the jury that the burden of proof is on the plaintiff, and before they can find a verdict for the plaintiff the jury must be satisfied by a preponderance of the evidence that the plaintiff did loan the defendant the amount of money claimed by plaintiff, or some other amount, at the time mentioned in the account filed herein, or some other time; and, unless the jury so find, their verdict must be for the defendant. By mentioning the burden of proof and the preponderance of evidence the court means

McKeon v. Chicago M. & St. P. Ry. Co., 94 Wis. 477, 69 N. W. 175 (178), 35 L. R. A. 252.

30—Padgett v. Jacobs, 128 Mich. 632, 87 N. W. 898.

31—Hanchett v. Haas, 219 Ill. (546, 548), 76 N. E. 845. "This instruction, in effect, has been approved by this court in Taylor v. Felsing, 164 Ill. 331, 45 N. E. 161, and Chicago City Railway Co. v. Bundy, 210 id. 39, 71 N. E. 35." See Mitchell v. Hindman, 150 Ill. 538, 37 N. E. 916, where the court says: "The law only requires that a preponderance of the evidence should be in favor of the plaintiff."

See, also, Donley v. Dougherty, 75 Ill. App. 379 (380); R. R. Co. v. Karzalkierwiecz, 75 Ill. App. 240; R. R. Co. v. Loftus, 83 Ill. App. 194; Taylor v. Felsing, 164, 332-5, 45 N. E. 161. But see O'Donnell v. Armour, 111 Ill. App. 516 (523) where an instruction substantially as above was declared erroneous because of the use of the words "although but slightly."

32—Taylor v. Taylor's Estate, 138 Mich. 658, 101 N. W. 832 (834). "Construing it in connection with the remainder of the charge, as it certainly should be, the jury were told that, after rejecting the testimony of witnesses discredited by them, their verdict should be for claimant, if there was 'more' testimony, that is, a preponderance of testimony—tending to establish the validity of her claim; if there was not, their verdict should be for the estate. As thus construed the charge was correct, and is not open to the objection urged by appellant."

merely to briefly express the rule of law, which is that, unless the evidence before you, in regard to the facts necessary (under these instructions) to a verdict in favor of plaintiff, appear, in your judgment, more credible than the contrary evidence regarding said facts, or than the evidence of the facts mentioned in these instructions as constituting a defense to plaintiff's said claim, then your verdict should be for the defendant.[33]

§ 360. **Burden of Proof on Plaintiff.** (a) Gentlemen of the jury, the burden of proof is upon the plaintiff to make out his case by a preponderance of the testimony.[34]

(b) If the jury find from the evidence that the plaintiff has made out his case by a preponderance of the evidence as alleged in the declaration, then the jury should find the defendant guilty, etc.[35]

(c) When the plaintiff brings a suit into court, the burden of proof is on him to make out his case to the jury to the satisfaction of the jury in every essential element.[36]

(d) All the facts necessary to entitle the plaintiff to recover in this case must have been established by a preponderance of all the testimony, for you are instructed that the burden of proof is upon him throughout the case. If such facts have not been so established, the defendant is entitled to your verdict.[37]

(e) The burden of proof is upon the plaintiff to establish by a preponderance of the evidence the facts necessary to his recovery. By a "preponderance of the evidence" is meant that which, in your opinion, has the greater weight.[38]

(f) The court further instructs the jury that the burden rests on the plaintiff to prove his case by a preponderance of the evidence in this case, and unless the plaintiff has so proved his case by a preponderance of all the evidence in this case, you should find the issues for the defendant.[39]

33—Stephan v. Metzger, 95 Mo. 609, 69 S. W. 625 (627).

34—Bering Mfg. Co. v. Femelat, 35 Tex. Civ. App. 36, 79 S. W. 869 (871).

35—In I. C. R. R. Co. v. Harris, 162 Ill. 200 (201), 44 N. E. 498, the court held, "The objection made to this instruction is that it uses the words 'as alleged in the declaration.' This form of instruction has been approved by this court in a number of cases, and it is unnecessary to repeat what is said in those cases. Penna. Co. v. Marshall, 119 Ill. 399, 10 N. E. 220; Chi. Ry. Co. v. Bannister, 195 Ill. 48, 62 N. E. 864; W. C. St. R. R. Co. v. Scanlan, 168 Ill. 34, 48 N. E. 149; Chgo. C. Ry. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087; City of La Salle v. Kostka, 190 Ill. 130, 60 N. E. 77; Mt. Olive Coal Co. v. Rademacher, 190 Ill. 538, 60 N. E. 888; W. C. St. R. R Co v Polkey, 203 Ill. 225, 67 N. E. 793, W. C. St. R. R. Co. v. Lieserowitz, 197 Ill. 607, 64 N. E. 718; Laflin & Rand P. Co. v. Tearney, 131 Ill. 322, 23 N. E. 38; Ohio & Miss. Ry. Co. v. Porter, 92 Ill. 437, 19 Am. St. Rep. 34, 7 L. R. A. 262; U. S. Brewing Co. v. Stollenberg, 211 Ill. 531 (533-4), 71 N. E. 108. Also see C. R. I. & P. Ry. Co. v. Cleveland, 90 Ill. App. 308; also, Chgo. C. Ry. Co. v. Manger, 105 Ill. App. 579.

36—Powell v. Ga. F. & A. Ry. Co., 121 Ga. 803, 49 S. E. 759 (761).

37—S. K. Ry. Co. v. Sage, 98 Tex. 438, 84 S. W. 814.

38—Wells v. Houston, 23 Tex. Civ. App. 629, 57 S. W. 584 (589).

39—I. C. R. R. Co. v. Prickett,

(g) The burden of proof is upon the plaintiff in this case, and it is necessary, before he is entitled to a verdict at your hands, that he should establish by a preponderance of the evidence the allegations of his complaint.[40]

(h) The burden of proof is not upon the defendant to show how the plaintiff came to fall. If the preponderance of the evidence does not show that she fell by reason of the car being negligently and suddenly started and moved in manner and form as charged in the declaration, or some count, thereof, then the plaintiff has failed to make out her case under the declaration in this case.[41]

(i) It devolves on the plaintiff to prove all the material facts in the complaint by a preponderance of the evidence, and if she fails to do so, you should find for the defendant.[42]

§ 361. Burden of Proof on Plaintiff—When the Evidence is Evenly Balanced. (a) The court instructs you that the second principal issue in this case is whether the defendant was or was not indebted to the plaintiff as claimed by the plaintiff at the time this suit was begun, and the burden of proving by the preponderance of all the evidence in the case that the defendant was indebted to the plaintiff as claimed by him at the time this suit was begun is upon the plaintiff; so, if the plaintiff has failed so to prove by the preponderance of all the evidence, then your verdict upon that issue should be for the defendant; so, if the evidence upon that issue is equally balanced, your verdict should be for the defendant; so also if the evi-

210 Ill. 140 (148), 71 N. E. 435. "The court instructs the jury as a matter of law that the burden of proof is upon the plaintiff to establish every element of her case, and it is for her to do this by a preponderance of the evidence; and if the jury find that the evidence bearing upon the plaintiff's case is evenly balanced or that it preponderates in favor of the defendant, then the plaintiff cannot recover, and the jury will find for the defendant."

Also, S. R. R. Co. v. Boyd, 156 Ill. 416, affg. 57 Ill. App. 535, 40 N. E. 955.

40—John Ainsfield Co. v. Rasmussen, 30 Utah 453, 85 Pac. 1002.

41—C. Union T. Co. v. Olsen, 211 Ill. 255 (257), 71 N. E. 985.

42—De Hart v. Board of Comrs., 143 Ind. 363, 41 N. E. Rep. 825 (826, 827).

"In support of the objection to this instruction we are cited Long v. Doxey, 50 Ind. 385. The instruction there condemned told the jury, in effect, that they must find for the defendant if the plaintiff had failed to establish all the facts alleged in the complaint. That is a very different thing from requiring the plaintiff to prove all the material facts alleged in the complaint. In Lime Co. v. Griffin, 139 Ind. 147, 38 N. E. 411, speaking of a similar objection to an instruction, this court said: 'Other charges, stating the theory of the action, the burden of proof, and the requirement that less than all the facts pleaded by the plaintiff would not support a recovery were given, when considered in connection with that to which exception is taken, presented the question fairly that upon the whole case a preponderance of the evidence must be found in favor of the material facts of the complaint before a verdict for the plaintiff could stand.' That decision is exactly applicable to and decisive of the objection to the instruction now before us."

dence upon that issue fails to preponderate in favor of the plaintiff, your verdict should be for the defendant.[43]

(b) The court instructs the jury that the burden of proving that the defendant owed the plaintiff anything on any account when this suit was begun is upon the plaintiff, and unless he has proved, by the preponderance of all the evidence in the case, that defendant was indebted to him at the time of the beginning of this suit, then the plaintiff cannot recover, and your verdict should be in favor of the defendant.[44]

(c) The court instructs you, as a matter of law, that the burden of proof is upon the plaintiff, and it is for him to prove his case by a preponderance of the evidence. If you find that the evidence bearing upon plaintiff's case is evenly balanced, or that it preponderates in favor of the defendant, then the plaintiff cannot recover, and you should find for the defendant.[45]

(d) The jurors are instructed that with respect to the ailments and disabilities claimed for the plaintiff in this case, the burden of proof is upon the plaintiff in that respect, as it is with respect to the question of liability, to show, by a preponderance of the evidence, not only that such ailments really exist or have existed, but also that such ailments and disabilities are the result of the accident in question. The jury are further instructed that they have no right to guess or conjecture that any ailment complained of by the plaintiff is the result of this accident.[46]

43—Barron v. Burke, 82 Ill. App. 116.

44—Id.

45—Hayward v. Scott, 114 Ill. App. 531. "This instruction is criticised because of its use of the expression 'find that the evidence bearing upon the plaintiff's case.' It is insisted that the instruction omits the necessary words, 'if you believe from the evidence,' or 'in that state of the proof,' and directs the consideration of the jury to the evidence 'bearing upon the plaintiff's case,' instead of the evidence 'bearing upon the whole case.' The use of the expression 'believe from the evidence' in the concluding sentence of this instruction, thus, 'if you believe from the evidence that the evidence bearing upon the plaintiff's case,' etc., would be mere tautology, and tend to confuse rather than otherwise. The expression 'bearing upon the plaintiff's case,' is equivalent to 'bearing upon the plaintiff's cause of action,' the only matter in controversy, and was manifestly so understood by the jury. We do not regard the instruction erroneous for the reasons urged."

46—C. U. T. Co. v. May, 221 Ill. 530 (536), 77 N. E. 933. The court said: "Under this instruction, unless the jury found that the conditions disclosed in the appellee's genital organs at the time of said surgical operations were such as were reasonably certain to follow as a result of the injury complained of, they would be bound to disregard them in making up their verdict, otherwise not. (L. S. & M. S. Ry. Co. v. Conway, 169 Ill. 505). The law requires a case should be submitted to the jury if the evidence on behalf of the plaintiff, together with the legitimate inferences which may be drawn therefrom, fairly tends to support the cause of action stated in the declaration, and in determining whether the court erred in declining to eliminate from the consideration of the jury the evidence sought to be eliminated from their consideration in this case by the instruction refused by the court, the rule is the same. If, therefore, the testimony of the plaintiff be

§ 362. **When the Burden of Proof is On the Defendant.** (a) The burden of proof is upon the plaintiff to establish by a preponderance of the evidence each of the material allegations of his petition not admitted by the answer, and the burden of proof is upon the defendant to establish each of the affirmative allegations of his answer.[47]

(b) Under these pleadings, the burden is upon the defendant to establish his defense by a fair preponderance of evidence, and if he does this your verdict should be for him, but if he fails in this, then your verdict should be for the plaintiff.

(c) The court instructs the jury that the only question is, Were the patterns made as ordered by the defendant? If you find by a fair preponderance of the evidence that they were so made, then your verdict should be for the plaintiff, but, if not, then your verdict should be for the defendant.[48]

(d) The plaintiff has replied to the second paragraph of the defendant's answer by her reply of general denial, thus putting upon the defendant the burden of proving the allegations of such answer by a preponderance of the evidence before it can succeed thereon.[49]

(e) The court instructs the jury that, where the plaintiff proves by a preponderance of the evidence that certain sums of money have been paid to the defendant, and the defendant claims that said payment was made upon some other demand or account, which he claims he then held against plaintiff, the burden of proof is on the defendant to show by a preponderance of evidence that there then

taken as true, together with all legitimate inferences that may be drawn therefrom,—i. e., that the appellee was in good health prior to the injury; that she thereafter was in poor health; that she suffered pain in her head, back and left leg and lower part of the abdomen, and her genital organs became diseased, and an examination disclosed a severe injury to the lower part of the spine; that she may have had ovarian cysts from girlhood and suffered no inconvenience therefrom; that within a short time after the injury it was found that she did have ovarian cysts and fibroid tumors, from which she suffered greatly, necessitating two surgical operations to remove them,—might not the jury, from the admitted facts, have legitimately drawn the conclusion that a predisposition to those conditions existed in appellee prior to the injury but from which she suffered no inconvenience, and that such preexisting condition, as a result of such injury, was so aggravated as to make what was a harmless condition prior to the injury a distressingly painful one after the injury? We think they might. If we are correct in so holding, then under the authority of Chicago City Railway Co. v. Saxby, 213 Ill. 274, 72 N. E. 755, 104 Am. St. Rep. 213, the appellee was entitled to recover for such aggravated condition."

47—City of South Omaha v. Ruthjen, 71 Neb. 545, 99 N. W. 240; See Chi. T. R. R. Co. v. Schmelling, 197 Ill. 619, 64 N. E. 714, where a similar instruction was held erroneous.

48—White v. Adams, 77 Iowa 295, 42 N. W. 199, 200. "Taking the instructions together, it must have been clear to the mind of the jury that the burden was on the defendant to show that the patterns were not made in accordance with the models."

49—C. I. & E. Ry. Co. v. Patterson, 26 Ind. App. 295, 59 N. E. 688, (691).

was a subsisting and unpaid debt due defendant from plaintiff upon which such payment was applied.[50]

(f) The court instructs the jury that the burden of proof is upon the defendant to show title in the defendant to the property replevied. The court further instructs the jury that if you believe from the evidence that the evidence bearing upon said defendant's title to said goods is evenly balanced, or that it preponderates in favor of the plaintiff, then the court instructs the jury that you should find for the plaintiff.[51]

50—Prall v. Underwood, 79 Ill. App. 451. "It devolved upon appellee," said the courts, "of course, to show by a preponderance of the testimony that he had overpaid appellant. But if upon the trial it was claimed by appellant that certain money which the evidence showed appellee had paid him was applied on some other debt which appellee owed him, then the burden of proving such other debt was cast upon appellant."

51—Fabian v. Traeger, 117 Ill. App. 176. "Under the pleadings in this case the burden of proof was on defendant to establish if he could prove his title to the goods in question. Stevison v. Earnest, 80 Ill. 513. The fact that the instruction does not in express words point out the time at which defendant should show title to the property replevied, does not render it objectionable. The jury were neither misled nor confused by this omission."

Note.—For further instructions on the burden of proof, see chapter on General Instructions in Criminal Cases.

CHAPTER XIX.

TESTIMONY OF PARTIES.

See Erroneous Instructions, same chapter head, Vol. III.

§ 363. Parties—How Testimony Should be Weighed by Jury. (a) The jury are instructed, that while our statute renders parties to a suit competent witnesses, and allows them to testify, still the jury are the judges of the credibility and weight of such testimony; and in determining such weight and credibility, the fact that such witnesses are interested in the result of the suit, if it so appears from the evidence, may be taken into account by the jury, and they may give such testimony only such weight as they think it fairly entitled to under all the circumstances of the case, and in view of the interest of such witnesses.[1]

(b) The court instructs the jury, that while the law makes the defendant (or plaintiff) a competent witness in this case, yet the jury have a right to take into consideration his situation and interest in the result of your verdict, and all the circumstances which surround him, and give to his testimony only such weight as in your judgment it is fairly entitled to.[2]

§ 364. Parties—How Testimony of Plaintiff Should be Weighed. (a) The jury are instructed that, while the law permits a plaintiff in a case to testify in his own behalf, nevertheless the jury have a right, in weighing her evidence and determining how much credence is to be given to it, to take into consideration that he is the plaintiff and his interest in the result of the suit.[3]

1—Hill v. Sprinkle, 76 N. C. 355.
2—Nelson v. Vorce, 55 Ind. 455.
3—In W. Ch. St. R. R. Co. v. Estep, 162 Ill. 130, 44 N. E. 404, "we held the refusal of the trial court to give a similar instruction was not error, as the substance of it was embodied in another that was given. In W. Ch. St. R. R. Co. v. Dougherty, 170 Ill. 379, rev'g 64 Ill. App. 599, "we held the refusal to give an instruction identical with

(b) While the plaintiff is a competent witness to testify in her own behalf, yet the jury, in determining what weight, if any, they will give to her testimony, have a right to consider her interest in the result of this litigation, and what she has testified to against her interest, if anything, is to be taken as true, and what she has testified in her own favor is to be given only such weight as the jury may believe from all the evidence in the case it is entitled to.[4]

(c) The court instructs the jury that while the law permits the plaintiff in the case to testify in her own behalf, nevertheless the jury have the right in weighing her evidence, to determine how much credence is to be given to it, and to take into consideration that she is the plaintiff, and interested in the result of the suit.[5]

(d) The law of this State permits the plaintiff to be a witness in his own behalf, but it allows the jury to take the fact of his interest in the event of the suit into consideration, for the purpose of affecting his credibility as a witness.[6]

(e) The jury are instructed that, while the law permits the plaintiff in a case to testify in her own behalf, nevertheless the jury have a right, in weighing her evidence and determining how much cre-

this was cause for reversal, the conflict of evidence being sharp, and no instruction being given on the question." N. Ch. St. R. R. Co. v. Dudgeon, 184 Ill. 477 (489), affg. 83 Ill. App. 528, 56 N. E. 796.

See also W. C. St. R. R. Co. v. Nash, 166 Ill. 528, 46 N. E. 1082; C. C. Ry. Co. v. Mager, 185 Id. 336, 56 N. E. 1058, cited in C. C. Ry. Co. v. Toohey, 196 Ill. 410 (430), 63 N. E. 997, 58 L. R. A. 270; C. C. Ry. Co. v. Mager, 185 Ill. 336, 56 N. E. 1058; C. C. Ry. Co. v. Olis, 192 Ill. 514 (519), 61 N. E. 459. See also C. & E. I. R. R. Co. v. Burridge, 211 Ill. 9 (13), 71 N. E. 838.

4—In Montgomery v. Mo. Pac. Ry. Co., 181 Mo. 477, 79 S. W. 930 (933), the court said: "Perhaps no instruction given in criminal cases has been so persistently assailed by counsel for the defense as this instruction, asked by defendant in this case. It has usually been given in cases where admissions or confessions of the defendant have been proven wherein while confessing certain damaging facts he has at the same time sought to palliate or excuse his conduct. It has been strongly urged that the instruction is in a sense a comment upon the evidence by the court and an invasion of the province of the jury to weigh the evidence, but it has been sustained. In civil cases, while it has been approved in some cases on the state of facts developed, in others it has been ruled that where the court has, as it did in this case, given a general instruction on the credibility of witnesses, and authorizing the jury to take into consideration 'the interest of the witnesses in the result of the litigation,' it has been ruled not error to refuse it, citing Dahlstrom v. Ry. Co., 108 Mo., loc. cit. 540, 18 S. W. 919; Ephland v. Ry. Co., 137 Mo. loc. cit. 198, 37 S. W. 820, 38 S. W. 926, 35 L. R. A. 107, 59 Am. St. Rep. 498. While this instruction was held not to be error in Feary v. Metropolitan Ry. Co., 162 Mo. 105, 62 S. W. 452, there was no criticism of the former decisions of this court above noted, and it was obviously not the intention of the court to overrule them."

5—C. U. T. Co. v. Mommsen, 107 Ill. App. 353.

6—C. & G. T. Ry. Co. v. Spurney, 69 Ill. App. 549 (551).

"The statute admitting interested parties to testify in terms declares, that the interest of a witness may be shown for the purpose of affecting the credibility of such witness, and the defendant was entitled to have the jury so instructed, citing W. C. St. R. R. Co. v. Estep, 162 Ill. 130, 44 N. E. 404."

dence is to be given to it, to take into consideration that she is the plaintiff, and her interest in the result of the suit.[7]

(f) You may consider in determining upon the credibility of the plaintiff's statements, the motives he had to testify in his own favor.[8]

§ 365. Parties—How Testimony of Defendant Should be Weighed. The court instructs the jury that the defendants, having become witnesses in their own behalf, at once become the same as any other witnesses, and their credibility is to be tested by and subjected to the same tests as are legally applied to any other witness; and in determining the degree of credibility that should be accorded to their testimony, the jury have the right to take into consideration the fact that they are interested in the result of the prosecution as well as their demeanor and conduct upon the witness stand; and the jury are to take into consideration the fact, if such is the fact, that they have been contradicted by other witnesses. And the court further instructs the jury that if, after considering all the evidence in the case, they find that the accused have willfully and corruptly testified falsely to any fact material to the issue in this cause, they have the right to entirely disregard their testimony except in so far as their testimony is corroborated by other credible evidence or facts and circumstances proven in evidence in the case.[9]

§ 366. Parties—Corporations and Individuals Stand Equal. (a) The court instructs the jury that this case should be considered by the jury as between two persons of equal standing in the community. The fact that one of the parties is a corporation should not affect your minds in any way, but the right of each party should and must be determined upon the evidence introduced in the case, and the instructions given to the jury, which are the law, and only law, to guide you in your deliberations.[10]

(b) You will consider also that men and women may be operated upon by their sympathies one way or another. The sympathies of people come out sometimes very strongly in favor of the weaker party, or the female sex, or the poor man, when he is in controversy with the rich man, but jurors have no right to act upon any prejudice or any sympathy of that kind. You are to try to do exact justice between the parties, just as though they were two individuals standing upon perfect equality in all respects. Their rights are the same, and your duties are the same, and they are not to be evaded.[11]

7—C. C. Ry. Co. v. Olis, 94 Ill. App. 323 (326), affd. 192 Ill. 514, supra. See also C. C. Ry. Co. v. Mager, 185 Ill. 336, 56 N. E. 1058.

8—Meyer v. Milwaukee El. Ry. & L. Co., 116 Wis. 336, 93 N. W. 6.

9—"This instruction is fully sustained by Hirschmann v. People, 101 Ill. 568, and Rider v. People, 110 id. 11, and we shall content ourselves by referring to these cases to sustain the action of the court in giving the instruction." Siebert et al. v. People, 143 Ill. 571 (592), 32 N. E. 431; see also McElroy v. The People, 202 Ill. 473 (478), 66 N. E. 1058.

10—Septowsky v. St. L. Trans. Co., 102 Mo. 110, 76 S. W. 693 (695).

11—McDonnell v. Rifle Boom Co., 71 Mich 61, 38 N. W. 681, comments of the court: "It seems to me that

(c) The jury are instructed that the issues in this case should be determined by them as in an ordinary suit, where an ordinary plaintiff sues an ordinary defendant to recover money, giving the verdict to the plaintiff only if the evidence preponderates in favor of the plaintiff's contention, and, unless it does so preponderate, you should as readily give the verdict for the defendant; and determining where the preponderance lies, while it does not consist solely in the greater number of witnesses, the jury are instructed that the greater number of reputable, creditable witnesses on the one side or the other of any material point is proper matter to be considered in determining the question of preponderance; and you may also consider the position of witnesses at the time of the accident, the point of view from which they witnessed it, and everything which appeals to your judgment as affecting the value and reliability of their testimony.[12]

§ 367. Parties—Weight to be Given Testimony of Employes. (a) The court instructs the jury that, while they are the judges of the credibility of the witnesses, they have no right to disregard the testimony of an unimpeached witness sworn on behalf of the defendant simply because such witness was or is an employe of the defendant, but it is the duty of the jury to receive the testimony of such witness in the light of all the evidence, the same as they would receive the testimony of any other witness, and to determine the credibility of such employe by the same principles and tests by which they would determine the credibility of any other witness.[13]

(b) The jury are instructed that the fact that any witness in the case is or has been in the employ of either the plaintiff or defendant, as well as the relations which exist between any witness and either party to the suit, and any interest a witness may have in the result of the suit, so far as the same may be shown by the evidence, may be considered by the jury in determining the weight which ought to be given to the testimony of such witness, taking the same in connection with all the other evidence in the case, and the facts and circumstances proven.[14]

(c) You may take the testimony of these railroad men; you may

the court stated the law correctly in both of these quotations above noticed. The interest of a witness is to be always weighed and considered by the jury, and there could be no harm or impropriety, under the circumstances of this case, in what the circuit judge said. When counsel have referred to this interest, as they had the right to do, and when the jury may consider it, it certainly is not error for the court to instruct the jury, as he did in this case, that if the interest or employment of a witness has impaired or biased his judgment, such fact may be considered by them in weighing the value of his testimony."

12—"This refused instruction contained a correct principle of law applicable to the controversy which was not included in any instruction given." C. C. Ry. Co. v. Osborne, 105 Ill. App. 462 (466).

13—C. & Pro. St. Ry. Co. v. Rollins, 195 Ill. 219, affg. 95 Ill. App. 497, 63 N. E. 98.

14—Donley v. Dougherty, 75 Ill. App. 379; C. & P. St. Ry. Co. v. Rollins, supra. See also Chi. U. T. Co. v. Mommsen, 107 Ill. App. 353.

take into consideration any interest which they might have that would in any way influence their testimony here, but no inference unfair to men should be drawn because they are in the employ of the railroad company; you will take into consideration the testimony of the plaintiff—and then weigh up the testimony on both sides, and say where, in your judgment, the truth lies, and what your duty would be in giving weight to testimony.[15]

(d) The jury are instructed that, in considering the credibility of witnesses and in determining the worth of their testimony, they can take into consideration the fact that a witness is in the employ of defendant railroad company, and also his connection, if any, with the action causing the injury complained of, taking the same in connection with all other evidence in this case.[16]

§ 368. Weight to be Given—Testimony of Husband for Wife. (a) The jury are instructed that under the law of this state a husband is a competent witness to testify in behalf of his wife in a suit brought by the latter for personal injuries alleged to have been sustained by the wife. You are instructed that if the testimony of the husband appears to be fair, is not unreasonable, and is consistent with itself, and the witness has not been in any manner impeached, then you have no right to disregard the testimony of such a witness merely from the fact that he is related by marriage to the plaintiff in the case.[17]

15—Lovely v. Grand Rapids & I. Ry. Co., 137 Mich. 653, 100 N. W. 894, in which the court said:

"We see nothing objectionable in this language as a whole. None of the cases cited by defendant's counsel supports its contention that the circuit judge was in this instruction invading the province of the jury. It is true the jury were told that in weighing the testimony of the witnesses the interest of the witnesses might be considered; but in the same connection the court cautioned them against drawing an unfair inference based upon the fact that these witnesses were in the defendant's employ. The question is ruled by McDonell v. Rifle Boom Co., 71 Mich. 61, 38 N. W. 681, in which case the case of Railroad Co. v. Kirkwood, 45 Mich. 51, 7 N. W. 209, 40 Am. Rep. 453, relied upon by counsel, is analyzed and distinguished."

16—C. C. Ry. Co. v. Tohey, 196 Ill. 410 (429), affg. 95 Ill. App. 314, 63 N. E. 997, 58 L. R. A. 270. Here the court said: "This instruction is objected to on the ground that it singles out the employes of the defendant company who are witnesses and directs the special attention of the jury to their testimony. The court holds the objection cured by an instruction given on behalf of defendant that 'by law the employes of the defendant company are competent witnesses in the case, and that you have no right to arbitrarily reject any of their testimony merely because they are such employes, but it is your duty to receive, consider and weigh the same in connection with all the other testimony and circumstances in evidence in the case.'" (This instruction is not recommended as a form but is inserted as an authority.)—Author.

17—N. Ch. St. R. R. Co. v. Wellner, 206 Ill. 502, affg. 105 Ill. App. 652, 69 N. E. 6. Comment of court: "The complaint is not that it does not state a correct rule, but that it tended to give a weight to the testimony of the plaintiff's husband which it otherwise would not have had. The testimony of the husband of the plaintiff might properly have been and was likely to be commented upon by attorneys for the defendant as coming from one who could not fail, from his relationship, to feel interested in support of the plaintiff's claim.

§ 369. **Weight to be Given Testimony of Child.** You have also the testimony of the boy, and, of course, you should give it such weight as in your judgment it is worth. Of course you should recall his youth, and the extreme liability of a child to repeat what he has heard, if he has been talked to about a matter of that kind. Further, the whole matter, the whole question as to what weight his testimony should receive, is in your hands, bearing in mind these observations I have made.[18]

§ 370. **Oath of Witness Not Conclusive.** (a) The court instructs you that you are the sole judges of the credibility of the witnesses, and that you need not believe anything to be a fact simply because a witness testifies to it positively, if, from all the evidence and circumstances arising in the case, the demeanor of the witness upon the stand, the manner of his testifying, his apparent candor and fairness, his interest, if any, in said action, you believe that he has knowingly testified falsely.[19]

(b) You give credit to that testimony you think best entitled to credit, under all the evidence in the case. The jury are not bound by the mere sayings of any witness. If the mere sayings of a wit-

The instruction did no more than to tell the jury that because of such relationship his testimony was not to be disregarded."

18—Banks v. Ry. & Lighting Co., —— Conn. ——, 64 Atl. 14: "In thus calling the attention of the jury to considerations affecting the credibility of testimony which would have naturally occurred to any intelligent juryman, the court did not exceed its privilege or invade the jury's province, citing Bradley v. Gorman, 77 Conn. 211, 213, 58 Atl. 698, 66 L. R. A. 934; First Baptist Church v. Rouse, 21 Conn. 167; Setchel v. Keigwin, 57 Conn. 473, 18 Atl. 594; State v. Rome, 64 Conn. 329, 30 Atl. 57; Turner's Appeal, 72 Conn. 305, 44 Atl. 310. This conclusion from the character of the language objected to is in this case emphasized by the fact that it was accompanied by a careful and repeated reminder that the question as to what weight should be given to the child's testimony was one for it alone. 'It is competent in all cases, and in some highly expedient, for the court, not only to discuss, but to express its opinion upon, the weight of the evidence, without, however, directing the jury how to find the facts; and this is a right necessarily limited only by its own discretion.' First Baptist Church v. Rouse, 21 Conn. 167; Setchel v. Keigwin, 57 Conn. 473, 478, 18 Atl. 594. There is no error."

19—Chezen v. State, 56 Neb. 496, 76 N. W. 1056. "The foregoing is a correct exposition of the law, and a charge to the jury couched in substantially the same language was approved in Murphey v. Virgin, 47 Neb. 692, 66 N. W. 652. Unquestionably, jurors are to determine for themselves the credit to be given witnesses, and the weight to be accorded their testimony. The demeanor of a witness while testifying, his interest, apparent intelligence, candor and fairness, or want thereof, are all proper matters for consideration; and the triors of fact are not required to accept as true all sworn testimony, though not directly impeached or contradicted. The instruction assailed does not purport to apply to the defendant alone, who testified in his own behalf, as his counsel assume, but was alike applicable to all the witnesses in the case, whether examined on behalf of the prosecution or defense. The court, by this instruction, in no manner criticized, or cast reflections upon the testimony of the accused, but properly allowed the jurors to decide for themselves the weight his testimony should receive. The instruction was fair and free from error."

ness are in conflict with the well recognized facts, that is, the facts which appear to the jury from the evidence; if the testimony of that witness is inconsistent with reason or inconsistent with those facts, the jury are not bound by the testimony, however solemn the oath may be under which the witness gave the testimony. The jury find, not according to the mere sayings of the witnesses, but according to the opinion you may entertain of the evidence.[20]

(c) The jury are not required to accept as true the statement of any person merely because he has sworn to it; but you should consider the interest of such person in the case and his demeanor on the stand, and carefully weigh the statement in the light of all the facts and circumstances developed in evidence, giving it such weight, and no more, as you deem it entitled to. You are the sole judges as to whether or not you believe it.[21]

§ 371. **Failure of a Party to Testify.** (a) The court instructs the jury, as a matter of law, that while the statute of this State authorizes a party to a suit to go upon the stand and testify in his own favor, he is under no obligation to do so; and if he fails to do so, the jury have no right to infer from this fact alone anything prejudicial to such party, and no intendment should be made against him because he does not testify in his own favor.[22]

(b) **Failure of Brother to Testify.** The court instructs the jury that they should not draw any inference unfavorable to the defendant from the fact that the brother has not appeared as a witness in this case on behalf of the defendant if, from the evidence, the jury believe that said brother is unavoidably absent in Europe at the time of this trial.[23]

§ 372. **Testimony of Attorney.** The court instructs you, that an attorney is a competent witness for his client on the trial of a

20—Macon Cons. St. R. Co. v. Barnes, 113 Ga. 212, 38 S. E. 756 (759).

21—Logan v. Met. St. Ry. Co., 183 Mo. 582, 82 S. W. 126 (133).

22—Lowe v. Massey, 62 Ill. 47.

23—Warth v. Loewenstein & Sons, 219 Ill. 225-226, 76 N. E. 379. "The evidence for the appellant showed, and the brief of counsel for appellant here admits, that the only matter said witness could have testified to, if present, was as to part of the negotiations had between W. acting for appellant, and said L. acting for appellee, in reference to the alleged agreement of February, 1895. The verdict of the jury is consistent only with the view they found that the contract was made and entered into as claimed by the appellant, hence it is clear the instruction, whether accurate or not, did not produce any harmful result to the appellant.

"It is insisted that the court erred in permitting the witness, over the objection of the appellant, that it was immaterial, to state why his brother, L., had gone to Europe. We do not think this was error. The correct rule is stated as contended for by counsel for the appellant, that the mere withholding or failing to produce evidence which under the circumstances, would be expected to be produced and which is available gives rise to a presumption against a party. (Mantonya v. Reilly, 184 Ill. 183.) But evidence may be given in behalf of the party who fails to produce such evidence to explain such failure, and thereby rebut any inference or presumption that might otherwise arise therefrom."

cause; and the testimony of such a witness should not be disregarded by you, simply because he is an attorney testifying in favor of his own client. In such a case, you are the judges of the weight and credit to which such testimony is entitled. You may consider whether the statements of the witness are apparently fair and candid, or otherwise; whether they are consistent with themselves, and to what extent, if any, they are corroborated or contradicted by other evidence in the case, and give to the testimony such faith and credit as you believe it entitled to, in view of all the facts and circumstances appearing on the trial.[24]

24—Note.—It is of doubtful professional propriety for an attorney to become a witness for his client on the trial of a cause, without first entirely withdrawing from any further connection with the case as attorney; and an attorney occupying the attitude of both witness and attorney for his client subjects his testimony to criticism, if not suspicion. Ross et al. v. Demos, 45 Ill. 447; Best on Ev., § 184; 1 Greenlf. on Ev., § 364, 386.

CHAPTER XX.

IMPEACHMENT IN GENERAL, GENERAL REPUTATION, CONTRADICTORY STATEMENTS.

See Erroneous Instructions, same chapter head, Vol. III.

§ 373. Impeachment by General Reputation for Truth and Veracity. (a) A person's reputation for truth is made by what his neighbors generally say of him in this regard. If they generally say he is untruthful, that makes his general reputation for truth bad. Upon the other hand, if a man's neighbors say nothing whatever about him as to his truthfulness, that fact of itself is evidence that his general reputation for truth is good.[1]

(b) The court instructs the jury that one of the means recognized by law for impeaching the veracity of witnesses is the introduction of persons as witnesses who testify that they are acquainted with the general reputation for truth and veracity of the person sought to be impeached, in the neighborhood in which he resides; and if the jury believe, from the evidence in this case, that the reputation for truth and veracity of any party or witness who has testified before you, in the neighborhood where he resides is bad, then the jury have a right to disregard the whole of such person's testimony and treat it as untrue, except so far as it is corroborated by other credible evidence or by facts and circumstances proved on the trial.[2]

1—Treschman v. Treschman, 28 Ind. 206, 61 N. E. 961. "This same instruction was approved in the case of Davis v. Foster, 68 Ind. 238. See also Conrad v. State, 132 Ind. 254, 31 N. E. 805."

2—Hill v. Montgomery, 184 Ill. 220 (224), affg. 84 Ill. App. 300, 56 N. E. 320. In this case the court said: "We think the law is well settled that where the general reputation of a witness for truth and veracity is bad in the neighborhood where he resides, the jury may disregard his evidence, except in so far as it is corroborated by

(c) The court instructs the jury that if you believe from the evidence that the moral character of any witness or witnesses has been successfully impeached on this trial, then that fact should also be taken into consideration in estimating the weight which ought to be given.[3]

(d) The jury are instructed that, if you believe from the preponderance of the evidence, that the general reputation for truth and veracity of any person who testified upon the trial of the cause has been successfully impeached, or that any witness has willfully sworn falsely as to any matter or thing material to the issues of this case, then the jury are at liberty to disregard the entire testimony of any such witness, except in so far as the same has been corroborated by other credible evidence, or by facts and circumstances proved upon the trial of this case.[4]

(e) When it is successfully shown that the general reputation of witness in the community in which he lives for truth and general moral character is bad, he is impeached, and the jury will be warranted in disregarding the testimony of such a witness as unworthy of belief. But it must be shown that the bad reputation is general in the community—that is, that it is generally so reported and considered in the community; and if it has not been thus impeached the jury should not reject it, but should give it proper consideration and weight.[5]

(f) If you believe from the evidence in this case that plaintiff's general reputation for truth and veracity is bad in the community in which he lives, then you have a right to disregard his testimony as a witness as being unworthy of belief. But you are not bound to disregard it. It is for you to say, in the light of all the facts and circumstances in the case, whether any or all of his testimony is unworthy of belief, and you will give it such weight as you deem it entitled to, or none, if entitled to none.[6]

§ 374. Impeachment—Contradictory Statements as Tending to Impeach. (a) If you believe from the evidence that any witness, before testifying in this case, has made any statements out of court, concerning any of the material matters, materially different

other evidence or by facts and circumstances proven on the trial, and this is the substance of this instruction. The instruction is sustained by Freeman v. Easly, 117 Ill. 317, 7 N. E. 656; Hirschman v. People, 101 Ill. 568; Miller v. People, 39 Ill. 457."

3—Smith v. State, 142 Ind. 288, 41 N. E. 595.

4—Hill v. Montegomery, 184 Ill. 220, 56 N. E. 320.

In Miller v. People, 39 Ill. 457, a similar instruction was approved.

5—Winter v. Central Iowa Ry. Co., 80 Iowa 443, 45 N. W. 737, "saying that it must be shown that the bad reputation is general in the community—that it is generally so reported and considered—is not saying that there must be the unanimous opinion of the community. It is simply saying that, unless generally condemned, it does not amount to an impeachment."

6—Buchholtz v. Incorporated Town of Radcliffe, 129 Ia. 274, 105 N. W. 336.

and at variance with what he or she has stated on the witness stand, then the jury are instructed by the court that these facts tend to impeach either the recollection or the truthfulness of the witness, and the jury should consider these facts in estimating the weight which ought to be given to his or her testimony.[7]

(b) A witness may be impeached by showing he or she has made other and different statements out of court from those made before you on the trial. Among the purposes for which such impeaching evidence may be considered by you is to aid you in determining (if it does so) the weight (if any) to be given the testimony of such witness, and his credibility or otherwise; but such impeaching evidence is not to be considered as tending to establish the alleged guilt of the defendant.[8]

(c) The court charges the jury that if they find from the evidence that the witness J. P. has made contradictory statements as to material facts in this case, or any of such facts, the jury may look to these contradictory statements in order to determine what credence they will give to the testimony of the said J. P.[9]

(d) The court instructs the jury, that one of the modes of impeaching a witness, is by showing that he has made statements out of court at variance with his statements on the witness-stand; and if the jury believe from the evidence that any witness has made statements at another time and place at variance with his evidence in this case, regarding any material matter testified to by him, then it is the province of the jury to determine to what extent this

7—In Smith v. State, 142 Ind. 288, 41 N. E. 595, the court said that "while the jury are the sole judges of the facts, and also have the right, in criminal cases, to determine the law (clause 5, § 1892, Rev. St. 1894; § 1823, Rev. St. 1881), yet, by the same statute, it is required that the court charge the jury as to the law, and also that in 'charging the jury he must state to them all matters of law which are necessary for their information in giving their verdict.' It was certainly necessary for the information of the jury that they should be told the nature of the testimony referred to, namely, that it was impeaching; that it was not introduced to prove any issue in the case, but solely tended to impeach either the recollection or the truthfulness of the witness. Otherwise, and had the instruction not been so given, the jury might have thought it their duty to apply the evidence to the issues in the case."

8—Marek v. State, — Tex. —, 94 S. W. 469. "The criticism made to this charge is that it uses the word 'he' in applying the law to the facts. In the first part of the charge, however, we find that the jury were told that 'he' or 'she' could be impeached, etc. Our statute defining terms says that terms denoting the male gender includes also the female. We do not believe that the jury under this charge were liable to have misapplied it, and would have applied it only to those witnesses who were shown to have made different statements out of court to those testified to on the trial. Appellant who testified on his own behalf, was not impeached by such testimony; and the jury were afforded no reason to apply the charge to him."

9—Pitts v. State, 140 Ala. 70, 37 So. 101. The court said: "The charge above given at the request of the state was proper. Hale v. State, 122 Ala. 85, 26 So. 236."

A charge similar to the above was approved in Smith v. State, 118 Ala. 117, 24 So. 55.

fact tends to impeach, either his memory or his credibility, or detracts from the weight which ought to be given to his testimony.[10]

(e) Some evidence has been introduced for the purpose of impeaching the testimony of certain witnesses who have testified before you by attempting to show that such witnesses have made statements out of court in conflict with their testimony in this case. The court instructs you that a witness may be impeached in this manner, but as to whether any witness in this case has been successfully impeached in this mode, and if he has been so impeached the extent to which this has been done, are questions of which you are the exclusive judges.[11]

(f) If the jury believe from the evidence that any witness, before testifying in this case, has made any statements out of court concerning any of the material matters, materially different and at variance with what he has stated on the witness stand, then the jury are instructed by the court that these facts tend to impeach either the recollection, or the truthfulness of the witness, and the jury should consider these facts in estimating the weight which ought to be given to his testimony.[12]

(g) If any witness had given any testimony at any other trial, materially different from that given by him at this trial, the jury should consider the fact as bearing upon the credibility of such witness at this trial.[13]

§ 375. Weight of Contradictory Statements is for the Jury. (a) The court instructs the jury that if they believe from the evidence in this case that any witness in this case has made a statement at this trial, on the witness stand, in conflict with a statement made at a previous trial of this case, then such conflict may be considered by the jury for the purpose of determining the credibility of such witness, and the weight to be given the testimony of such witness. You are the sole judges of the credibility of all witnesses, and of the weight to be given to the testimony of each.

(b) The court instructs the jury that if they believe from the evidence that any witness in this case, at a time prior to this trial,

10—Craig v. Rohrer, 63 Ill. 32.

11—Lynch v. Bates, 139 Ind. 206, 38 N. E. 806; Smith v. State, 142 Ind. 288, 41 N. E. 595, 51 L. R. A. 404; Treschman v. Treschman, 28 Ind. App. 206, 61 N. E. 961.

12—Glaze v. Whitley, 5 Ore. 164; 1 Greenl. on Ev., Sec. 462.

13—Bennett v. Susser, 191 Mass. 329, 77 N. E. 884. In this case the court said: "In the ruling given the judge evidently had in mind the rule which has been applied to a party in a case who testifies, as well as to any other witness, and which is thus stated by Mr. Justice Foster in Brigham v. Clark, 100 Mass. 430: 'Wherever a witness has testified to any material facts, any acts or declarations of his which appear to be inconsistent with his version at the trial are competent by way of contradiction.' This rule has since been followed. Foster v. Worthing, 146 Mass. 607, 16 N. E. 572; Handy v. Canning, 166 Mass. 107, 109, 44 N. E. 118. It is, however, a familiar rule that if any party to a cause suborns a witness to testify falsely, this may be shown as an admission on his part that he has not a just claim. Egan v. Bowker, 5 Allen 449."

had made a voluntary admission in regard to the facts thereof, and that such admission is in conflict with the evidence given by such witness at the trial of this case, such conflict may be considered by the jury for the purpose of determining the credibility of the testimony of such witness, and the weight to be given to the evidence of such witness.[14]

(c) The question is whether it goes to the credibility of B's testimony. What credit will you give a witness who says one thing in court and another out? The fact whether or not he did make such a statement brings you down to consider the testimony of Mr. O. Did he (B.) make that statement? It is a question of fact for you to decide, and when you have found that he made contradictory statements, if so, you are to decide what his testimony is worth. How far you will believe or not believe him.[15]

§ 376. Contradictory Statements Must be on Matters Material to the Issues. (a) If any witness in the case has at another time and place made statements, material to the issues in this case, at variance with his testimony while on the witness stand before you, then you are at liberty to disregard the whole of such witness' testimony, except in so far as he is corroborated by other credible evidence.[16]

(b) I charge you that a witness may be impeached by proof of contradictory statements; and, if you believe that any witness has been successfully impeached, why, then it would be your duty to discard the evidence of such witness; but it is for you to say whether or not you will believe the witness sought to be impeached or the witness brought to impeach him, the credibility of all witnesses being for you and your consideration. If you believe that any witness has been successfully impeached in reference to contradictory statements upon some material issue in the case—and it must be some material issue in the case—then you would not be authorized to believe him, unless you find that he has been corroborated. He may be corroborated, or he may be sustained by proof of good character, or by other facts and circumstances in the case.[17]

(c) The court charges you, that, although a witness may be im-

14—Septowsky v. St. L. Tr. Co., 102 Mo. 110, 76 S. W. 693.

15—Parnell v. State, 129 Ala. 6, 29 S. W. 860.

16—Blotcky v. Caplan, 91 Iowa 352, 59 N. W. 204 (205). "The credit of a witness may also be impeached by proof that he has made statements out of court contrary to what he has testified at the trial. But it is only in such matters as are relevant to the issue that the witness can be contradicted. Greenl. Ev., para. 462. Surely, if the discrepancies in the statements of a witness were of such a character as to satisfy the jury that he was unworthy of belief, they were at liberty to disregard the whole of his testimony, except as corroborated by other witnesses. This rule is kindred to that which authorizes a jury to disregard all the testimony of a witness who knowingly testified falsely as to one or more material matters."

17—Powell v. State, 101 Ga. 9, 29 S. E. 309, 65 Am. St. Rep. 277.

peached by either one of the ways known to the law, you would be authorized to believe the witness, if you believe the witness has sworn the truth in this case. This is the question now for you. If you believe this witness that has been thus impeached, you are authorized to believe his testimony, if you believe he has sworn the truth in this case.[18]

§ 377. **Contradictory Statements—Test Is Not Truth of Former Statement, but of That Made at the Trial.** (a) It is always competent, as I have said, to show that a witness had elsewhere made different statements from that made on the stand; and, when evidence of that fact is put before you, you are to take it into consideration in determining, not whether the statement made elsewhere is true, but in determining whether the statement made here is true. By way of illustration, it may be that a person elsewhere has made certain statements as to a fact, and then comes here and makes an entirely different statement of that fact, and admits that elsewhere he made contradictory ones. You might be entirely satisfied that the statement made here is true, and, if so, it is to govern you. On the other hand, you might from the appearance of the witness, and all the facts and circumstances, be satisfied that the statement made elsewhere is true, and that made here is untrue. It is entirely a question for you as to what effect it will have upon you here. You are to take into consideration all the circumstances in determining whether or not this statement is a correct statement.[19]

§ 378. **Jury Need Not Disregard the Entire Testimony of Impeached Witness.** (a) The testimony of a witness who has been impeached ought not to be wholly disregarded by you if you feel justified, from his deportment upon the stand, or the probability of his testimony, in believing it, even if it receives no other corroboration.[20]

(b) You may properly believe a witness who has testified upon several matters as to some of them, though you may believe the testimony false upon others. You have not a right to reject all of a witness' testimony merely because you conclude that he testified falsely

18—Ector v. State, 120 Ga. 543, 48 S. E. 315 (316). The court said in comment: "The credibility of a witness is always for the determination of the jury. His character may be assailed; his previous contradictory statements as to material matters relevant to the case may be brought against him; but, notwithstanding these attacks, his credibility is for the jury and they may believe him, despite the evidence submitted to impeach, if they believe he swears truly. This principle has been so often promulgated that it is hardly necessary to bolster it up by authority. It may not be amiss, however, to cite a case where the conviction was upheld although the sole witness for the state was shown by other witnesses to be a man of bad character, and had made contradictory statements. Davis v. State, 94 Ga. 399, 19 S. E. 243."

19—Tarbell v. Forbes, 177 Mass. 238, 58 N. E. 873.

20.—Green v. Cochran, 43 Ia. 544; Addison v. State, 48 Ala. 478; City Bk. v. Kent, 57 Ga. 258.

as to some material matters. If a witness willfully testifies falsely as to any material matters in the trial of a cause, you may properly —but you are not bound—to reject all his evidence which is not corroborated by some other credible evidence.[21]

(c) While the law permits the impeachment of a witness by proving his general reputation for truth and veracity in the neighborhood where he resides to be bad, yet, if you believe that the plaintiff, while on the stand, gave a truthful, candid and honest statement of the facts and circumstances surrounding the transaction in question, then the jury should not disregard his testimony, but you should give it such faith and credit as in your opinion it is entitled to.[22]

(d) The court instructs the jury that they are not required by law to disbelieve a witness who has testified before them in this case because the general reputation of such witness for truth and veracity in the neighborhood where he resides has been proven to be bad, and said witness shown not to be entitled to credit when on oath; but it is the province of the jury to give the evidence of any witness who has testified in this case such credit as the jury may believe, from all the facts and circumstances in the case, it is entitled to; the jury being the sole judges of the evidence in the case, as well as the credibility of the witnesses who have testified in this case.[23]

§ 379. **Party Cannot Impeach His Own Witness.** Where, in the trial of a suit, a party places a witness upon the stand, he thereby indorses his reputation for truth and veracity, and he will not be permitted to say that such witness is unworthy of belief.[24]

§ 380. **Attorney Talking to a Witness Does Not Tend to Discredit or Impeach.** The mere fact that a witness has talked to an attorney of a party to this suit and has told such attorney what the said witness

21—"The last sentence of this quotation seems to be substantially the same as sanctioned in a recent opinion of this court, and its correctness is not questioned. Patnode v. Westenhaver, 114 Wis. 460, 487, 90 N. W. 467. The criticism is as to the portion of the charge to the effect that the jury had no right to reject all of the testimony of a witness 'merely because they concluded that some material portion thereof was false.' But we perceive no substantial difference between that statement and the statement contained in the quotation from the adjudication cited in support of the contention to the effect that if the jury find 'that a witness has testified falsely as to a material fact they are of course at liberty to disregard such testimony,' but that before they would be justified in rejecting all of his testimony they should 'find that the witness knowingly or intentionally or corruptly swore falsely as to a material fact.' Little v. Superior Rapid Transit R. Co., 88 Wis. 407, 408, 60 N. W. 705. See also Cahn v. Ladd, 94 Wis. 134, 68 N. W. 652. We cannot say that the portion of the charge quoted was erroneous. Suckow v. State, — Wis. —, 99 N. W. 440 (441).

22—Roy v. Goings, 112 Ill. 666.

23—State v. Roberts, 50 W. Va. 422, 40 S. E. 484 (486), 57 Am. St. Rep. 186.

24—Campbell v. Holland, 22 Neb. 587, 35 N. W. 871.

would testify on this trial, does not of itself in any wise tend to impeach or discredit the testimony of such witness.[25]

25—N. C. St. R. R. Co. v. Anderson, 70 Ill. App. 336, (339), affd. 176 Ill. 635, (639), 52 N. E. 21. The court modified the above instruction by adding to it, as follows: "But such fact may be considered by the jury, together with all the other facts in evidence in determining the weight of such testimony."

The instruction as asked was correct, and it should not have been modified as it was.

"It is not only the right, but the duty of the attorney of a party to a cause to talk to his witnesses and to learn from them their knowledge of the facts and circumstances of the case, and what their testimony will be concerning the same before calling them to the stand to testify, and no improper inferences are to be drawn from the performance of such duty. To tell the jury that such a circumstance of itself goes to the credibility of witnesses or to the weight of their testimony, is to tell them what is not the law, and never was the law; and to so instruct a jury as to the law, might, in a proper case, be ground for the reversal of a judgment. See C. & G. T. Ry. Co. v. Spurney, 69 Ill. App. 549.'"

CHAPTER XXI.

ADMISSIONS AS AFFECTING CREDIBILITY.

See Erroneous Instructions, same chapter head, Vol. III.

§ 381. Admissions to be Taken as a Whole but All Parts Not to be Regarded with Equal Confidence. (a) The admissions of a party, when proved, are evidence against him, and, although such admissions are to be taken together as a whole, the jury are not bound to regard all parts of them with equal confidence. The fact that they are against his interest, or in favor of it, their improbability, inconsistency, contradiction or corroboration, by other facts in proof, are circumstances proper to be considered by the jury in determining the weight to be given to such admissions or to the several parts thereof.[1]

(b) While the jury are not required to give equal credence to every part of the statements or admissions of the defendant, if they believe, from the evidence, that any such statements or admissions have been proved, yet the whole of such statements should be carefully weighed and considered by the jury in the light of all the surrounding circumstances appearing in evidence—the motives which may have induced it—its consistency with the other evidence; and the jury, without capriciously or causelessly accepting or rejecting any portion, should credit such parts as they find reason for believing, and reject that part which they find reason for disbelieving, in view of all the facts and circumstances proved on the trial.[2]

§ 382. **Admissions Against Interest—Credibility of Plaintiff.** The plaintiff was a witness in his own behalf. The jury are the sole

1—Riley v. State, 4 Tex. Cr. App. 538.
2—Eiland v. State, 52 Ala. 322; State v. Hollenscheit, 61 Mo. 32, 21 Am. Rep. 397; Riley v. State, supra; 1 Greenlf. Ev. §§ 201, 202; Best on Ev. § 520.

judges of his credibility. All statements made by him, if any, which are against his own interest, must be taken as true; but his statements in his own favor are only to be given such credit as the jury, under all the facts and circumstances in evidence, deem them entitled to.[3]

§ 383. **Conditional Admissions of Defendant at Time of Accident—Negligence.** It is contended upon the part of the plaintiff that the defendant, at the very time when this accident occurred—when the wheel was precipitated into the pit, and broken in pieces—stated that it was due to his own carelessness, and that he would have to pay for it, or expected to pay for it. If at that time the defendant had not been guilty of such a degree of negligence upon his part as to render him liable for that accident, under the rules of the law as I defined them, then the statement upon his part that he was liable would not, in and of itself, create any liability. His liability is not dependent upon what he may admit or upon what he may deny; but it is dependent upon the state of facts upon which due care or of any care is predicated. At the same time an admission of fact made under such circumstances, at the very time of the happening of the accident, when all the facts are fresh and open to observation, and made by a man who had engaged in this work, and made against his own interest, is evidence to which you will give such weight, as an admission of carelessness, as, in your judgment, it may be entitled to. The fact that some days afterwards, after he had taken counsel in respect to his legal liability, he denied liability, would not tend to lessen the force of the admissions of fact that he made at the time as evidence of how he then considered the work had been done. The theory of the defendant is that he did not admit at the time, or state, that it was due to his carelessness, but that he did state at the time that, if he was liable, he would pay for the wheel. The form in which he makes this state-

3—Feary v. Met. St. Ry. Co., 162 Mo. 75, 62 S. W. 452.

"It is admitted," said the court, "that a similar instruction was held to be proper in a criminal case. State v. Brooks, 99 Mo. 137, 12 S. W. 633. But it is insisted that it is error to give it in a civil case. No good reason for such a distinction occurs to the legal mind. Admissions made in court, in the testimony of a party, have the same effect as if made in the pleadings, and admissions in a pleading are taken as true for the purposes of the action, citing Shirts v. Overjohn, 60 Mo. 308; Wright v. Town of Butler, 64 Mo. 165. Statements against interest are called 'admissions' in civil cases, and 'confessions' in criminal ones. They are taken as true for the purposes of the case, because no man would make them if they were not true. If confessions are enough to hang a man or to send him to the penitentiary under the criminal statutes, it is hard to see why admissions should not be enough to conclude him in a civil suit. Greenl. Ev. (16th Ed.) § 170 says: 'The rules of evidence in both cases are the same.' In Rodney v. Railway Co., 127 Mo. 676, 30 S. W. 150, speaking to a similar instruction, Macfarlane, J., said: 'He is conclusively bound by every declaration and admission against his interest made while testifying before the court and jury.' State v. Brooks, 99 Mo. 142, 12 S. W. 633, and cases cited."

ment is conditional. If he were liable, then he would answer for the damages, but if it should turn out, in view of all the facts and the law of the case, that he was not so liable, then he made no promise to pay; and, in view of the form in which he claims he made the statement, it is not evidence against him, to any extent, in the absence of some other proof of a distinct liability for his negligence.[4]

§ 384. **Verbal Admissions to be Received with Great Caution.** (a) The court instructs the jury, that although parol proof of the verbal admissions of a party to a suit, when it appears that the admissions were understandingly and deliberately made, often afford satisfactory evidence. Yet, as a general rule, the statements of a witness as to the verbal admissions of a party should be received by the jury with great caution, as that kind of evidence is subject to much imperfection and mistake. The party himself may have been misinformed, or may not have clearly expressed his meaning, or the witness may have misunderstood him; and it frequently happens that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party did actually say. But it is the province of the jury to weigh such evidence and give it the consideration to which it is entitled, in view of all the other evidence in the case.[5]

(b) Evidence of oral admissions and declarations of parties should be received with caution, remembering the liability of the human mind to err in remembering the statements and declarations of parties. When the declaration of a party is brought in, we should cautiously receive it. Evidence of oral admissions and oral contracts, when proven, declarations of parties, constitute very strong testimony, of course. There can't be anything stronger when established. I think declarations of this character should be cautiously received.[6]

(c) The court instructs the jury, that, although parol proof of the verbal admissions of a party to a suit, when it appears that the admissions were understandingly and deliberately made, often afford satisfactory evidence, yet, as a general rule, the statements of witnesses as to the verbal admissions of a party should be received by the jury with caution, as that kind of evidence is subject to imperfection and mistake. The party himself may have been misunderstood, or may not have clearly expressed his meaning, or the witness may have misunderstood him; and it frequently happens that a witness by unintentionally altering a few expressions really used, gives an effect to the statement completely at variance with what the party did actually say. But it is the province of the jury to weigh

4—Swift El. L. Co. v. Grant, 90 Mich. 469, 51 N. W. 539.

5—Martin v. The Town, etc., 40 Ia. 390; Saveland v. Green, 40 Wis. 431; Mauro v. Platt, 62 Ill. 450. But see § 3362.

6—Thompson v. Purdy, 45 Ore. 197, 77 Pac. 113.

such evidence, and give it the consideration to which it is entitled, in view of all other evidence in the case.[7]

§ 385. Oral Admissions Received with Caution and Viewed with Scrutiny—Regarded as Weak Evidence. (a) You are instructed that the evidence of certain witnesses as to oral admissions or statements of defendant, alleged to have been made to them, should be received with great caution and viewed with scrutiny, and that in considering such testimony you should take into consideration the surrounding circumstances and surroundings of defendant, and the probability or improbability of his having made such statement.[8]

(b) As to those statements claimed to have been made by the plaintiff as to the cause of his injury, you are instructed that it is proper to take them into consideration as bearing upon his credibility, and also upon the question of whether or not the injury he complained of was caused in the manner complained of, or in some different way. In this connection I think I should caution you that this class of evidence—that is, statements made by witnesses as of admissions or statements made by the plaintiff to them—should be carefully scrutinized; not because witnesses willfully misstate alleged admissions or statements they may have heard, but because of the fact that we know so well by experience how easy it is to be mistaken as to a word or expression uttered by a third person, and which we are undertaking to repeat long afterwards. You have seen it exemplified in this case, where witnesses misspeak themselves, and where attorneys differ as to what their witness has actually said here upon the witness stand.[9]

(c) Evidence of casual statements or admissions of a party, made in casual conversations to disinterested persons, are regarded by law as very weak testimony, owing to the liability of the witness

7—Baker v. Borello et al., 136 Cal. 160, 68 Pac. 591.

8—People v. Hill, 1 Cal. App. 414, 82 Pac. 398, (399). The court said: "Certain oral admissions of defendant, made to the officers soon after his arrest, had been placed in evidence through the testimony of the officers. This instruction must be understood as applying to those admissions, and, thus understood, we cannot see how it can be regarded otherwise than as favorable to defendant. If it were conceded to be erroneous, it could not have harmed the defendant; and this would be so, even if it were directed at some statement that the defendant had previously made, and upon which he relied at the trial to aid his defense, citing People v. Wardrip, 141 Cal. 232, 74 Pac. 744."

9—Hart v. Village of New Haven, 130 Mich. 181, 89 N. W. 677. Remarks by court: "It is urged that the instruction relating to the testimony of witnesses offered to prove admissions was injurious, as it indicated distrust, on the part of the court, of such testimony. The instruction was one which the authorities justify, but justice requires care, in giving instruction, lest the jurors infer that it reflects an opinion, or are led to deny to the testimony its legitimate and proper weight. Any discussion of witnesses, or their evidence, especially where it applies to individual witnesses, or, if a class, to those upon one side only, should be dispassionate. We think this was so intended, and do not feel justified in concluding that the jurors were misled by it."

to misunderstand or forget what was really stated or intended by the party. It is considered to be the weakest kind of evidence.[10]

§ 386. **Admissions of Husband or Wife as Affecting the Other.** Any admissions which Mr. B. may have made, not in the presence of Mrs. B., cannot affect her rights to maintain her action, unless you find such admissions were true. His evidence and admissions are to be treated the same as the evidence and admissions of any other witness on the case, so far as her rights are concerned.[11]

§ 387. **Admissions in Pleadings, Obviating Necessity of Proof.** (a) The court instructs the jury that the affidavit of the defendant denying the execution of the note is not evidence, and they have no right to consider it in determining whether the defendant executed and delivered the note in evidence.[12]

(b) The legal effect of this admission is to relieve the plaintiff of the necessity of making any proof with reference to the matters alleged in his petition, and to place upon the defendants the burden of establishing, by the preponderance of the evidence, the facts set forth in their answer, or such facts as might be necessary to constitute a defense in whole or in part, and all other questions hereinafter propounded to you by the court which can be answered "Yes" or "No" will be answered by you in the negative, unless you believe from a preponderance of the evidence deemed credible by you that same should be answered in the affirmative.[13]

10—Grotjan v. Rice, 124 Wis. 253, 102 N. W. 551. "That was applicable to the evidence which the jury had to deal with. There was considerable evidence of the nature suggested in the request. Such request was good law according to the repeated decisions of this court, and therefore it should have been given to the jury, Haven v. Markstrum, 67 Wis. 493, 30 N. W. 720; Emery et al v. State, 101 Wis. 627, 648, 78 N. W. 145."

11—Broderick v. Higginson, 169 Mass. 482, 46 N. E. 269, 61 Am. St. Rep. 296. "But to prove the facts relied on by him, the admission of the husband was competent in the husband's case and not in the wife's. If her case was to be tried alone, it is clear that her husband's admissions would not be competent. They were not made competent against her by the fact that for convenience his case was being tried at the same time with hers. It was the duty of the presiding judge to instruct the jury that these admissions might be considered in his case, but not in hers. Sometimes the risk that a party who has made no admissions may be prejudiced by the admissions of another party whose rights or liabilities depend on the same facts is so great that a court will order separate trials, when otherwise their cases would be tried together. When cases of the kind are tried together, the jury should be properly instructed, so that the rules of evidence may be applied for and against each other, as if but one case was on trial. The above instruction requested upon this part of the case was correct."

12—Hunter v. Harris, 131 Ill. 482, 23 N. E. 626. The court said: "The only effect of the affidavit filed with the pleas was to cast the burden on the plaintiffs to prove the execution of the note as at common law. The defendant was not a competent witness in his own behalf, the plaintiff suing in a representative capacity. In practice it is doubtless difficult, if not impossible, to prevent the jury from knowing the defendant had denied under oath the execution of the instrument, and the instruction was proper as a matter of precaution, and its giving was not error."

13—Walker v. Dickey, — Tex. Civ. App. —, 98 S. W. 658.

§ 388. **Admissions in Affidavit for Continuance.** The court instructs the jury, that the plaintiff, by admitting the statements contained in the affidavit for a continuance, which were read in evidence before you, simply admits that if the said witness A. B. were present here as a witness testifying in this case, he would testify as stated in the affidavit; but the plaintiff does not admit that such testimony would be the truth; he has the same right to contradict such admitted testimony as though the witness were present and had testified to the same matter on the witness stand.[14]

§ 389. **Offer to Compromise—Party not Bound by.** The jury are instructed, that parties have a right to get together and buy their peace, by making concessions to each other; and any offer or proposition of settlement, if made for that purpose merely, will not be binding upon the party as an admission of the amount due or claimed at the time.[15]

§ 390. **Party not Bound by Statements of His Own Witnesses.** The court instructs the jury, that when a party offers a witness and places him on the witness stand he thereby represents him in general to be worthy of belief; but such party is not thereby precluded from proving the truth of any particular fact by any other competent testimony, in direct contradiction to what such witness may have testified to; and this is true not only when it appears that the witness was mistaken, but also when the evidence may collaterally have the effect of showing that he was generally unworthy of belief.[16]

"Evidence was introduced," said the court, "by the parties respectively tending to establish and to disprove appellant's defense based upon the alleged contract of April 10, 1895, and the occasion did not arise for a declaration upon whom the burden of proof rested. Stocksbury v. Swan, 85 Tex. 566, 22 S. W. 963. It was sufficient to instruct the jury that the admissions of appellants relieved appellee of the necessity of proving the allegations of his petition, and that the issues should be decided upon a preponderance of the evidence deemed credible by the jury. The preponderance of the evidence, taken as a whole, however, supports the finding of the jury, and it is clear that they were not misled by the charge upon the burden of proof."

14—U. S. Ins. Co. v. Wright, 33 Ohio St. 533.

15—Barker v. Bushnell, 75 Ill. 220; Payne v. Rd. Co., 40 N. Y. S. Ct. 8; Plummer v. Carrier, 52 N. H. 287; Gay v. Bates, 99 Mass. 263.

16—Skipper v. Georgia, 59 Ga. 63; Warren v. Gabriel, 51 Ala. 235; Gibbs v. Hayler, 41 N. Y. 191; Blackburn v. Com., 12 Bush. (Ky.) 181; Becker v. Koch, 104 N. Y. 394, 10 N. E. 701.

CHAPTER XXII.

EXPERT TESTIMONY.

See Erroneous Instructions, same chapter head, Vol. III.

§ 391. Expert Testimony—Definition. An expert witness is one who is skilled in any particular art, trade or profession, being possessed of peculiar knowledge concerning the same, acquired by study, observation, and practice. Expert testimony is the opinion of such a witness, based upon the facts in the case as shown by the evidence, but it does not even tend to prove any fact upon which it is based, and, before you can give any weight whatever to expert testimony, you must first find from the evidence that the facts upon which it is based are true. The jury is not bound by expert testimony, but it should be considered by you in connection with the other evidence in the case.[1]

1—Smith v. Mo. & K. Tel. Co., 113 Mo. App. 429, 87 S. W. 71, (75). "The words 'but it does not even tend to prove any fact upon which it is based, and, before you can give any weight whatever to expert testimony, you must first find from the evidence that the facts upon which it is based are true' are objected to as containing an improper definition and prejudicial direction, the harmfulness of which, it is urged, is emphasized by the fact that some of defendant's witnesses from whom opinion evidence was elicited also gave testimony upon basic facts. Generally speaking, the opinion of a witness who, by reason of his training and experience in a given art, profession, or trade, possesses superior knowledge to that enjoyed by others, is received for the purpose of aiding the triers of fact in reaching a conclusion upon an ultimate fact, not susceptible of direct proof, but deducible from proven facts. For the purpose of obtaining such opinion, the questioner is permitted to assume as proven the basic facts he is attempting to establish, and which are usually vital issues in the case. The opinion, therefore, is a dependent, a sort of superstructure imposed upon an hypothetical foundation, and stands or falls with its supporting facts. Obviously, a conclusion cannot serve to strengthen the premises from which it arises. Therefore the statement that such evidence 'does not even tend to prove any fact upon which it is based' is correct in principle."

§ 392. **Reason for Expert Testimony—Valueless When not Supported by Evidence or if Any Facts in the Hypothetical Question are Untrue.** The expert witnesses are called to testify, not because they were present, and witnessed any facts which they came here to tell you about, but because they are supposed to have given this particular branch of science more study than you or I, or the attorneys, and hence they come here to give you their judgment, based upon certain facts which are supposed to be proven from the evidence; and, upon that statement of those facts, they give you their opinion or their judgment. Now, gentlemen, that evidence, in the end, is subject to your supervision and to your judgment. They give you their opinion, as I have said before, upon a supposed state of facts,—supposing certain things to exist as shown from the evidence. Now, it becomes important for the jury, just as far as you can, to look into evidence, and determine whether the facts which are supposed to exist in the hypothetical question that is asked of the doctors do actually exist,—whether there is any evidence upon which to base them in this case, and whether the fact supposed to exist be true or not—because if one fact supposed to be true, included in the question, is untrue, not supported by the evidence, then the opinion of the doctor would be valueless. He gives his opinion upon a certain state of facts supposed to be true, and we don't know what his opinion would be if one of those facts were withdrawn.[2]

§ 393. **Expert Testimony Subject to Same Rules of Credit or Discredit as Other Testimony—Does Not Establish Truth of the Facts Upon Which They are Based.** (a) The testimony given by the physician and expert who testified in this case is to be taken and considered by the jury like the evidence of the other witnesses who testified in the cause; and the opinions on questions of insanity, which have been given by the medical expert, are subject to the same rules of credit or discredit as the testimony of the other witnesses, and are not conclusive on the jury. These opinions neither establish nor tend to establish the truth of the facts upon which they are based. Whether the matters testified to by the witness in the cause are facts, are true or false, is to be determined by the jury alone; and you must also determine whether the facts and matters stated and submitted to experts in the hypothetical questions are true in fact and have been proven in this case.[3]

(b) The opinion of experts who have testified in this cause is testimony which the jury should consider and examine in connection with all the other testimony in this case, subject to the same rules of credit and disbelief as the testimony of other witnesses.[4]

2—People v. Foley, 64 Mich. 148, 31 N. W. 94, (98).

3—State v. Privitt, 175 Mo. 207, 75 S. W. 457, (461).

4—Longan v. Weltmer, 180 Mo. 322, 79 S. W. 655, 657, 64 L. R. A. 969.

§ 394. Professional Standing of Witness to be Taken into Consideration—Testimony Not Binding—Weight to be Given. (a) The court instructs the jury that they are not bound by the testimony of the expert witnesses, but in considering such testimony the professional standing and experience of such witnesses must be taken into consideration in arriving at a verdict.[5]

(b) The court instructs the jury that they are not bound to accept as true the opinions of the doctors who have testified as experts in this case, but may give said opinions and each of them such weight as the jury may deem them entitled to, or altogether disregard such opinions, in so far as the jury, from all the facts and circumstances in evidence, may believe such opinions unreasonable.[6]

§ 395. Expert Testimony Not to Be Considered to Entire Exclusion of Other Testimony, But in Connection—Must Decide from all the Evidence. (a) The opinions of medical experts are to be considered by you in connection with all the other evidence in the cause, but you are not bound to act upon them to the entire exclusion of other testimony. Taking into consideration these opinions, and giving them just and proper weight, you are to determine for yourselves, from the whole evidence, whether the defendant was or

5—Cosgrove v. Burton, 104 Mo. App. 698, 78 S. W. 667. "In Hoyberg v. Henske, 153 Mo. 63, 55 S. W. 83, it was held that 'juries are in nowise bound to accept the opinions of expert witnesses, if they deem them unreasonable; and an instruction in a civil action which so states is not error.' In Cosgrove v. Leonard, 134 Mo. 419, 33 S. W. 777, 35 S. W. 1137, the verdict was founded wholly as to the value of plaintiff's services upon the testimony of expert witnesses. The court held it was sufficient to support a verdict. In Hull v. St. Louis, 138 Mo. 625, 40 S. W. 89, 42 L. R. A. 753, which followed the holding of the court in St. Louis v. Ranken, 95 Mo. 189, 8 S. W. 249, it was held proper to instruct the jury to give to the opinions of expert witnesses the weight to which they believed they were entitled. It is the opinion of some jurists that an instruction that calls attention to this testimony of witnesses as a class ought never to be given. But, as such is now the law, and as juries may believe or disbelieve them at their own will, it certainly would be appropriate for them to take into consideration their professional standing and experience. The trial court ought, at least in an advisory capacity, be authorized to lay down some rule for the guidance of the jury in passing upon the credibility of such witnesses. And if the opinions of such witnesses are sufficient, as held in Cosgrove v. Leonard, supra, to support a verdict, it was certainly not error to instruct the jury that in making up their verdict they must take into consideration their standing and experience in their profession. In fact it is the duty of jurors in all cases not only to take into consideration the credibility of witnesses, but also every other circumstance tending to weaken or strengthen their testimony. And as the law is that the courts are authorized to instruct juries that they may disregard the evidence of expert witnesses, there can be no good reason assigned why jurors should be left without any direction whatever in weighing the force of such evidence."

6—In Day v. Dry Goods Co., 114 Mo. App. 479, 89 S. W. 903, the court said: "The instruction is correct in every particular, except the last word 'reasonable.' It is a clerical error, as every one would, from the sense of the instruction, come to the conclusion that 'unreasonable' was meant. Such verbal criticisms are usually rejected by the courts. Shortel v. City of St. Joseph, 104 Mo. 114, 16 S. W.

was not of sound mind, giving him the benefit of a reasonable doubt, if any such arises from the evidence.[7]

(b) The court further instructs the jury that the opinions of the experts are to be considered by you in connection with all the other evidence in the case. You are not to act upon them to the entire exclusion of other testimony. You are to apply the same general rules to the testimony of experts that are applicable to the testimony of other witnesses, in determining its weight. Taking into consideration the opinions of the experts, and giving them just weight, you are to determine for yourselves, from the whole evidence, whether the defendant is guilty, as she stands charged, beyond a reasonable doubt.[8]

(c) The opinions of the medical experts are to be considered by you in connection with all the other evidence in the case, but you are not bound to act upon them to the exclusion of all other evidence. Taking into consideration these opinions and giving them just weight, you are to determine for yourselves from the whole evidence whether the accused was, or was not, of sound mind, yielding him the benefit of a reasonable doubt, if any such doubt arises.[9]

397, 24 Am. St. Rep. 317; Eichorn v. Mo. Pac. Ry Co. 130 Mo. 575, 32 S. W. 993."

7—Wagner v. State, 116 Ind. 181, 18 N. E. 833. "We are unable to see in what respect that instruction invaded the province of the jury, or threw discredit upon the testimony of the expert witnesses. It seems to us that if the instruction was faulty at all, the complaint should come from the state. Such a fault, if any, could by no possibility affect appellant injuriously. It is not necessary, however, to extend the discussion of that instruction as it seems to have been copied from an instruction also approved in the case of Goodwin v. State, 96 Ind. 550."

Cosgrove v. Leonard, 134 Mo. 419, 33 S. W. 777; Hull v. St. Louis, 138 Mo. 625, 40 S. W. 89, 42 L. R. A. 753; Hoyberg v. Henske, 153 Mo. 63, 55 S. W. 83; Longan v. Weltner, 180 Mo. 322, 79 S. W. 655, 64 L. R. A. 969; Markey v. L. & M. R. R. Co., 185 Mo. 348, 84 S. W. 61.

8—Epps v. State, 102 Ind. 539, 1 N. E. 491. In this case the court said: "It is complained that this instruction told the jury in effect that they might consider the testimony of the experts to the partial exclusion of other evidence, and that it was error to so instruct the jury. It does not necessarily follow that the instruction was erroneous, conceding the construction of it contended for. But, however that may be, we see no objection to the instruction as a whole, and can only regard the criticism made upon it as an impracticable one. Goodwin v. State, 96 Ind. 550."

9—Goodwin v. The State, 96 Ind. 555, (561). In approving the instruction the court said: "The objection urged against this instruction is that it informs the jury that the testimony of experts is not entitled to greater weight than that of non-expert witnesses. We do not think the argument is correct, either in point of fact or law. The instruction does not as counsel assume direct the jury to act upon one class of evidence to the exclusion of others, but in plain terms instructs them to consider the whole evidence. But counsel's theory of the law is radically wrong. It would have been error for the court to tell the jury that the expert witnesses speaking merely as to matters of opinion and basing their opinions on hypothetical questions were entitled to more credit than witnesses who [illegible] knowledge of facts gathered from personal observation, and who based their opinions on actual facts, and not on supposed cases. As both kinds of evidence are competent, the jury are charged with the duty of determining the weight and effect of the evidence in each particular case, and the court has

(d) The court has allowed in this case the introduction of evidence known as expert testimony, and has allowed expert witnesses to testify as to what, in their opinion, was the cause of death of T. But, gentlemen of the jury, their opinion so expressed is not binding or conclusive on you. It is for you to determine from all the facts and circumstances developed in this case, including the opinion of said expert witnesses, what in fact was the cause of the death of said T. And you are to give to their opinion such weight and credit as you shall deem it entitled to after taking into consideration their knowledge and skill as disclosed in their testimony, and all the other facts and circumstances shown and developed in their testimony.[10]

(e) The weight to be attached to the expert testimony is also a question for you to determine. If you reach a given conclusion, from the consideration of the whole evidence, including as well the opinions of the experts, as substantive facts deposed to by witnesses, whether experts or non-experts, you are not to surrender your conclusion, which is your opinion on the whole evidence, because the opinions of the experts do not coincide with yours, but lead to a different result.

To express the same thought in different language, you are not to substitute for your own views of what is established by the whole evidence,—substantive and opinion, expert and non-expert—the opinion of expert witnesses; for to thus surrender your own conclusions, and to substitute instead the conclusions of witnesses as to what has been proved by the evidence, would be to make such witnesses, and not the jury at all, the triers of the cause.[11]

no right to charge them to give preference to the one class or the other. Tatum v. Mohr, 21 Ark. 349, 99 Am. Dec. 701; Chandler v. Barrett, 21 La. Ann. 58."

10—Morrow v. Nat. M. Acc. Assn., 125 Iowa 633, 101 N. W. 468, (470).

"There was no error," said the court, "in giving this instruction. It announced the general rule, as we understand it, and the rule of this court. Arndt v. Hosford, 82 Iowa 499, 48 N. W. 981; Aetna Life Ins. Co. v. Ward, 140 U. S. 76, 11 Sup. Ct. 720, 35 L. Ed. 371. It did not in effect even belittle the testimony of the physicians, but told the jury that it was not bound to treat their evidence as to the cause of death conclusive, and under the record, this was true. If there had been no conflict on this question, the jury would have had no right to disregard this evidence and find independently of it. But when there is a conflict in the evidence on a given point it is the general rule that the jury is not bound to treat the testimony of any witness as conclusive, no matter whether he was an expert or a non-expert; and this is in substance the instruction given. In Brush v. Smith, 111 Iowa 217, 82 N. W. 467, the trial court did, in fact, belittle the expert testimony by saying to the jury that it ought never to be allowed to overcome clear and well established facts, and that it was the lowest order of evidence—an entirely different instruction from the one under consideration."

11—Moratsky v. Wirth, 74 Minn. 146, 76 N. W. 1032. "The instructions, however, are not fairly susceptible of the construction counsel seeks to give them. They were to the effect that the weight to be attached to expert testimony was a question for the jury, and that their conclusion as to any question of fact was to be based upon a consideration of the whole testi-

§ 396. **Jury Judges of Expert Testimony Same as any Other—Opinions Merely Advisory.** (a) The opinions of expert witnesses are entitled to such weight as you deem proper to give them. You may accept or reject such opinions, as you may accept as true, or reject as false, any other facts in the case.[12]

(b) The jury are instructed that the opinions of the witnesses as experts are merely advisory, and not binding on the jury, and the jury should accord to them such weight as they believe from all the facts and circumstances in evidence, the same are entitled to receive.[13]

§ 397. **Hypothetical Questions Defined.** A hypothetical question is a question which assumes a certain condition of things to be true, a certain number of facts to be proved or to be disproved, and calls upon the witness to assume all the material facts stated to be true and express his opinion as to a certain condition. The witness to whom the hypothetical question is addressed assumes them to be true, and bases his answer upon the assumed case. The opinion of the witness must, therefore, be brought to the test of the facts in order that you may judge what weight the opinion is entitled to.[14]

mony, expert and non-expert, and that they were not to surrender their conclusion so formed because the opinion of the experts did not coincide with such conclusion; that to do otherwise, and accept the opinion of the experts as to what had been proven by the evidence, would make them, and not the jury, the triers of the cause. The ordinary function of experts is to assist, by their superior knowledge, the jury in reaching a correct conclusion from the facts in testimony before them. Their opinions are not, as a rule, conclusive upon the jury, but mere items of evidence for the consideration of the jury. But in a case where the evidence, and the facts to be deduced therefrom, are undisputed, and the case concerns a matter of science, or specialized art or other matter, of which a layman can have no knowledge, the jury must base their conclusion upon the testimony of the experts. In such a case it may be conceded that it would be error to give the instructions complained of. Such, however, is not the case, wherein both the expert and substantive evidence was conflicting."

12—State v. Lyons, 139 La. 959, 37 So. 890 (904). "The jurors were the sole judges of the credibility of the witnesses, and it was the duty of the judge to so inform them."

13—Markey v. Louisiana & M. R. R. Co., 185 Mo. 348, 84 S. W. 61. "Appellant contends that was error. In Hoyberg v. Henske, 153 Mo. 63, 55 S. W. 83, this court decided that such an instruction was correct, even in that case, where the expert testimony was that of learned witnesses in reference to an abstruse scientific subject. This instruction, therefore, must be held to correctly state the law on that subject, and the writer of this opinion must bow to it, although he dissented with all his might from the decision in that case." Criticized in Buckalen v. Quincy O. & K. C. Ry. Co., 107 Mo. App. 575, 81 S. W. 1176.

14—In re Dolbeer's Estate, — Cal. —, 86 Pac. 695 (700). 'Appellant concedes that his instruction 'may be true as an abstract proposition of law,' but insists that its tendency was to discredit the testimony of the expert physicians whom he had called. This objection is untenable, and the reasons which have been already given answer contestant's exception to the court's refusal to give certain instructions proposed by him upon the subject of expert testimony."

CHAPTER XXIII.

JURY—DUTIES AND POWERS.

See Erroneous Instructions, same chapter head, Vol. III.

§ 398. Must be Oblivious to Outside Pressure or Suggestions. (a) Now, gentlemen, you are to consider yourselves set apart solely for the purpose of considering what you hear in this courthouse, seeing what you see here, and you are not to pay any attention to outside pressure. You must be oblivious to any outside pressure. You are kings in your capacity, and mortal man cannot touch your judgment. You are to be sole judges. You are to listen to nothing that goes on on the outside. Your ears are to be deaf, and your eyes blind, to all except what happens here on this witness stand. Your duty is to inquire as to the guilt or innocence of these parties, as to what happens here in the courthouse, right here on the stand.[1]

(b) In your jury room you should not refer to, discuss or consider anything in connection with this case except the evidence received upon the trial. All extraneous matters, statements and suggestions should be carefully discarded by you; and you should base your verdict solely upon the evidence, and be guided by these instruc-

1—State v. Rhodes, 44 S. C. 325, 22 S. E. 306, (307).

tions alone. By your verdict the protection which the law wisely throws around the virtue of a woman and the family relation should not be lessened, nor the rights of this defendant disregarded.[2]

§ 399. Object of Juries to Obtain the Truth—Law Knows no Creed, Condition, Color or Nationality. (a) Your object is to obtain the truth, and when you have obtained the truth, and are satisfied to a conviction beyond a reasonable doubt, march up to your verdict with the same impartiality, and do your duty.

(b) The court further instructs the jury that the law knows no creed or condition, no color, no nationality; and you are instructed that every defendant, whether he be rich or poor, high or low, should be tried with perfect impartiality.[3]

§ 400. Cannot Resort to Conjecture, Possibilities, Suppositions or Imaginings. (a) You cannot resort to conjecture and possibilities, but you must consider only those injuries, if any, that the plaintiff, by a preponderance of the evidence, has shown to exist.[4]

(b) The court instructs the jury that, in considering this case, they should not indulge in any mere suppositions or imaginings as to what may or may not have been done or occurred at the time of the occurrence, but must decide the case upon the evidence of the witnesses and the instructions of the court. And the court further instructs the jury that they are the sole judges of the credibility of the witnesses and the weight to be given to their testimony, and in weighing the testimony the jury should take into consideration, not only what they have testified to, but also their manner of testifying, and their bias, if any is shown, toward or against plaintiff or defendant, their ability at the time to clearly see what occurred, and now to clearly recall and relate the facts; and if the jury believe, from the evidence, that any witness has knowingly sworn falsely to any material fact, then the jury may disbelieve the whole or any part of such witness' testimony.[5]

(c) The jury are instructed to take the case and decide it according to your sworn consciences, remembering that you are to find a verdict according to the testimony given you in the case. You are not to indulge in suppositions upon which no evidence has been given or offered. You have no right to trust your own opinion in the case, unsupported by proof. Jurors have no right to indulge in surmises and conjectures on subjects concerning which no evidence has been offered. They are bound to take the testimony for their sole guide.[6]

2—State v. Butts, 107 Iowa 653, 78 N. W. 687, (688).
The court said "that sufficient demonstration of the correctness of this paragraph is found in its bare reading. Value of argument was not discredited, nor the effect thereof eliminated by this charge."

3—Brown v. State, 105 Ga. 640, 31 S. E. 557, (559).

4—Winter v. Central Iowa Ry. Co., 80 Iowa 443, 45 N. W. 737, (738).

5—Logan v. Met. St. Ry. Co., 183 Mo. 582, 82 S. W. 126, (129).

6—Hannon v. State, 70 Wis. 448, 36 N. W. 1.

§ 401. **Jury Must Be Governed by the Instructions Alone as to the Law.** (a) The instructions given to the jury by the court must be accepted by them as the law governing this case. The jury will not be justified in finding a verdict contrary to the law as laid down by the court in this case.[7]

(b) The court is the judge of what is proper and competent testimony and the court is also judge of the law in this case. You should consider that only as law which has been given you by the court in the instructions. It is as much your duty to regard the law as given by the instructions of the court and decide this case in accordance therewith, as it is to consider the testimony in the case, and you should be governed as to the law in the case entirely by the instructions of the court.[8]

(c) The instructions given to the jury by the court must be accepted by them as the law governing the case; the jury will not be justified in finding a verdict contrary to the law laid down in the instructions. While the jury are the judges of the facts in this case, it is your duty to determine such facts under the law as laid down in the instructions of the court.[9]

(d) The jury are instructed that the instruction given to the jury by the court must be accepted by them as the law governing this case. The jury will not be justified in finding a verdict contrary to the law as laid down in the instructions.[10]

§ 402. **Jury to Look to the Evidence for the Facts and to the Court for the Law.** (a) In considering and deciding this case, the jury should look to the evidence for the facts, and to the instructions of the court for the law of the case, and find their verdict accordingly, without any reference as to who is plaintiff or who defendant.[11]

(b) In considering and deciding this case, the jury should look solely to the evidence for the facts, and to the instructions of the court for the law of this case, and find their verdict accordingly.[12]

(c) The jury are the exclusive judges of the credibility of the

7—"This stated a correct proposition of law and should have been given." C. & E. I. R. R. Co. v. Burridge, 211 Ill. 9 (15), 71 N. E. 838.

8—C. U. T. Co. v. O'Brien, 117 Ill. App. 183, (190).

9—W. C. St. R. R. v. Vale, 117 Ill. App. 155 (159, 160).

10—C. St. R. R. Co. v. Brown, 193 Ill. 274 (277), affg. 89 Ill. App. 318, 61 N. E. 1093.

11—C. St. R. R. Co. v. Brown, 193 Ill. 274, (277), affg. 89 Ill. App. 318, 61 N. E. 1093.

12—C. U. T. Co. v. O'Brien, 117 Ill. App. 184 (190). "It is a settled rule that instructions to the jury are to be regarded as a connected series, constituting a single charge. C. C. Ry. Co. v. Mead, 206 Ill. 174, 178, 69 N. E. 19; C. C. Ry. Co. v. Bundy, 210 Ill. 39, 49, 71 N. E. 28, The rule is strictly logical. The jury when instructed by the court are not informed, and it would be improper to inform them, as to what instructions were requested by the plaintiff and what by the defendant. The instructions are read by the presiding judge, consecutively, and as altogether constituting a single charge. We think the jury, in the present case, were sufficiently informed that they should be guided by the instructions of the court in passing on the facts."

witnesses and weight of the testimony. The law they will receive from the court.[13]

(d) It is the duty of the jury to find and determine the facts of this case from the evidence, and having done so, then to apply to such facts the law as stated in these instructions.[14]

§ 403. Duty of Jury to Be Governed by the Law and the Evidence. (a) Courts are established to minister the law and enforce its execution. The law is the only standard by which judges and jurors can be governed, and, in considering their verdict, jurors should be governed by the law as given them, and by the evidence. The only protection to the life, liberty and property of the citizen is in a prompt, honest and impartial enforcement of the law; and, if juries should intentionally and willfully disregard the law then the law is useless, and the court houses and jails might as well be torn down, the offices of judge, clerk and sheriff, and all other machinery necessary for the administration of the law, be abolished and save the people tax paid for maintaining and carrying on the courts.[15]

(b) The court instructs the jury to consider the whole case under the evidence and law as herein given you, and return such a verdict as you think right.[16]

(c) You have heard the evidence offered on both sides of the case. From that evidence you can learn what the facts are. The attorneys have had a wide range of discussion. They have had complete freedom of argument before you upon all questions of fact. It is their privilege in the argument to criticise the evidence,—those for the state to criticise the conduct of the prisoner; those for him to criticise the conduct of the witnesses against him, to impugn their motives if the evidence justifies it, and to assault the credibility of the witnesses. Counsel for the state have called your attention to the children of the deceased, and have intimated that, because of

13—Bering Mfg. Co. v. Femelat, 35 Tex. Civ. App. 36, 79 S. W. 869, (872).

14—N. C. St. R. R. Co. v. Wellner, 206 Ill. 272, (274), 69 N. E. 6.

"An instruction containing the same direction was approved by this court in N. C. St. R. R. Co. v. Kaspers, 186 Ill. 246, 57 N. E. 1041."

15—Williams v. State, 130 Ala. 107, 30 So. 484 (487). "The judge," said the supreme court, "was well within his powers and rights in thus attempting to remove from the minds of the jurors the poison of the unwarranted appeals of counsel to their passions and prejudices, and to bring them back, if indeed, they had been led astray, to a trial of the case upon the law and the evidence. It is of no consequence upon the rights of the judge in this connection that no objection had been made to these orations of counsel when they were delivered. Nor is it of consequence that the solicitor replied to them. Doubtless he did, and efficiently, demonstrating the folly of indulging in such tirades when able counsel are to follow. Notwithstanding this, the judge had his duty to discharge in clearing the skirts of justice of these alien and baneful contentions of counsel."

16—In McKenna v. Noy, 76 Iowa 322, 41 N. W. 29, (30), the court said: "The instruction is correct. The jury are told in substance to return such a verdict as they, under the evidence and law, regard correct."

your sympathy for their fatherless condition you should punish the defendant. Counsel for the defendant have pointed out to you the horrors of the penitentiary and of death upon the gallows, and have made appeals to your mercy. Now, I desire to impress upon you that you have nothing to do with questions of mercy. You are ministers of justice. The administration of mercy is a power that is vested in the executive department of our state, in the exercise of its authority to pardon. It is absolutely necessary and essential to the preservation of society that law should be enforced, and especially where acts of violence have been done. If we would preserve society and the rights of individuals, the law must be obeyed, and violators of the law punished; and you, as jurors, would be faithless to your trust if you should return a verdict of acquittal in this case when the facts demanded a conviction. And, above all, it is important that innocence should not be punished. You are not impaneled for vengeance, but to subserve the ends of public justice; and you would be disloyal to your obligations if you should find the prisoner guilty when the evidence required his acquittal. I have said this to impress you with the sense of responsibility which you owe to your conscience and oaths, that your verdict should be honest, intelligent, and in conformity to the evidence and the law. Do your duty honestly, conscientiously, courageously and justly, as you see it, under the evidence and the law of this case.[17]

(d) The court instructs the jury that you should not consider any matter, statement or declaration not introduced in the evidence admitted in the trial, or fairly applicable thereto.[18]

§ 404. Jury are to Be Guided by Evidence—Not to Consider Cost of Trial—Not to Keep Cases Out of Court by Their Verdicts. They are guided simply by the evidence they hear on the trial of the case. It is not for the jury so impaneled to decide whether or not the case ought to be prosecuted, not for them to take into consideration the cost of the trial, nor for juries to keep cases out of court by their verdicts. Those are not matters to be considered by the jury. They are proper to be considered, as citizens, in our efforts to perfect our laws, and see that justice is properly administered, and the burden to the people not too great; but, when you or I are sitting as court and jury, we must administer the law as we find it, not being responsible, as officials of the court, for the condition of affairs, nor the duties we have to perform.[19]

17—Dinsmore v. State, 61 Neb. 418, 85 N. W. 445 (452).

18—Richards v. Monroe, 85 Iowa 359, 52 N. W. 339, (340). "Its fair construction is that the jury were not to consider any matter, statement or declaration not in the evidence or admitted, and only such thereof as were fairly applicable to the case. If a matter was proven or admitted that was not fairly applicable to the case, it was not entitled to consideration."

19—Taylor v. State, 97 Ga. 361, 23 S. E. 995, (996).

§ 405. **Statements of Counsel Unsupported by the Law or Evidence Should not Be Considered.** (a) This case must be decided by the jury on the evidence, under the instructions of the court, and not upon the statements of counsel outside of the evidence unsupported by the evidence, if any such statements have been made. The evidence and law alone must govern your verdict. The jury are informed that the instructions of the court are the law of the case, which must govern them.[20]

(b) The court instructs the jury that, in considering this case, it is not only your duty to decide the case according to the weight of the evidence, but it is also your duty to decide it according to the law as given you by the court, applied to the evidence. While it is true as a matter of law that the attorneys for the respective parties may state to you what they believe the law to be, and base arguments thereon, still, under your oaths and under the law, you have no right to consider anything as law except it be given you by the court, and you have no right to take the statement of any attorney as to what the law is, except the court give you an instruction to the same effect, or, in other words, you should consider only that as law, as given you by the court, and decide the case accordingly.[21]

(c) The jury are instructed that they, the jury, are the sole judges of the questions of fact in this case, and they should determine the same from the evidence in the case. The court does not mean by any instruction given to the jury to tell them how they shall find any fact in the case, the finding of the facts being exclusively within the province of the jury. The jury should not be influenced as to the facts by any assertion or statement of counsel on either side of the case, unless the same is sustained by the evidence in the case.[22]

(d) The facts must be decided by the jury from the testimony which is received in open court. Offered testimony, to which objection was sustained, or which was stricken out by order of the court, is not before the jury and should not be considered in arriving at your verdict. Statements of counsel for either side, if any, which are unsupported by the testimony, or which are irrelevant to this case, should not be considered. The instructions given you by the court are to be considered as a series. The court has not expressed an opinion on the facts, and has not expressed an opinion on the credibility or character of any witness, and the court has no right to do so, and if the jury overheard anything said between the court and counsel in discussing questions of law or otherwise, the jury

20—C. & A. R. R. Co. v. McDonnell, 194 Ill. 82 (87), affg. 91 Ill. App. 488, 62 N. E. 308.

21—"The instruction was correct." Voche v. City of Chicago, 208 Ill. 192 (194), 70 N. E. 325.

22—Penn. Co. v. Greso, 102 Ill. App. 252 (257). "The instruction appears to us to be right, and not subject to the criticism of counsel, that the jury were left by it to understand that plaintiff's counsel was the judge of the questions of law."

should not consider anything but the evidence introduced before them and the law as laid down in the instructions of this court.[23]

§ 406. **Emphasizing Importance of the Case to the Jury—Importance of Their Duties.** (a) Gentlemen of the jury, in committing this case to you, the court desires to admonish you of the important issues involved. The court desires you to fully understand the responsibilities upon you of arriving at your verdict in the case. No more solemn or weighty duty can devolve upon a citizen of the state than to pass upon an issue involving the life and liberty of a fellow citizen. On the one hand you should remember that a failure to perform your duty, by which a crime, if one is shown, might go unpunished, and a criminal escape the penalty of his crime, cannot be corrected by a new trial, for the defendant cannot twice be put in jeopardy under our law. The state demands and has a right to ask, at your hands, the full performance of your duty in the enforcement of the law, and no notions of mere sympathy and sentimentality should cause you to hesitate in the full performance of your duty. And on the other hand you should never for a moment forget your duty to secure and protect every right guaranteed by the constitution and our law to the defendant. You should not allow any outside influence or pressure or indignation or sympathy for the deceased or his relatives to influence you in finding a verdict in this case. You should fairly and impartially and coolly and dispassionately examine the evidence in the case, and after carefully and fully examining and considering it, render your verdict under the law and the evidence, that full and complete justice may be rendered thereby between the state and the defendant.[24]

23—Fitzgerald v. Benner, 219 Ill. 485, (488, 500). 76 N. E. 709. "It is also said that the above instruction, given for the appellees, is erroneous, because it told the jury 'that the facts must be decided by the jury from the testimony, which is received in open court.' The word, 'testimony,' is said to signify oral evidence only, and therefore excluded from the consideration of the jury the documentary evidence. Even if such be the correct meaning of the word 'testimony,' it could not have misled the jury in the present case, for the reason that the concluding sentence of the instruction directs the jury to 'not consider anything but the evidence introduced before them, and the law as laid down in the instructions of this court.' It is admitted that the word, 'evidence,' is broad enough to include the documentary, as well as the oral evidence."

24—Simon v. State, 108 Ala. 27, 18 So. 731. "The instruction in the opinion of the writer, is similar to one often given in cases of this character. In so far as it involves rules of law, the statements thereof are correct; and there was no error I think, in emphasizing the importance of the case both to the state and the defendant. The defendant's rights in the premises were to my mind properly guarded, except, perhaps in the use of the words 'the crime' which are italicised in the instruction quoted; and with these words eliminated, there was no error I think in this paragraph. The instruction, except in the respects mentioned has support I think in the following cases: State v. Decklotts, 19 Iowa 447; Stout v. State, 90 Ind. 1; Smith v. State, 4 Neb. 288; State v. Talbott, 73 Mo. 347; People v. Hawes, 98 Cal. 648, 33 Pac. 791; Com. v. Harris, 168. Pa. 619, 32 Atl. 92."

(b) Remember, gentlemen, as I have already indicated, that while the amount involved here is neither great nor very small, that it is a case which involves careful discrimination. The rights of both of these parties—of all parties interested in the result of this litigation—is for the present in your hands, and it is always important, when men are selected to determine questions of fact which involve the property rights or liberties of their fellow citizens, that the utmost care shall be taken, and sometimes in cases of such a nature as this, that a finer judgment and keener intelligence must be used. This is a case, I think, where the higher qualities are involved—high qualifications are involved.[25]

(c) The offense charged in the information is a grave one, as it involves the criminal betrayal and breach of trust reposed in a trusted employe. The entire property of a corporation must of necessity be intrusted to, and its business carried on by, its employes, for, whether we call them officers, agents, servants, or by some other name, they are nevertheless its employes. And to a large extent the property and business of individuals must be intrusted to employes, such as clerks, cashiers, and the like; and it is a matter of great importance that all employes who, by virtue of some special confidence reposed in them, are intrusted with their employers' money or property, should faithfully care for and honestly account for whatever is committed to their care, custody, or possession. Both corporations and individuals can protect their property from strangers by bolts and bars and iron doors, but not so with trusted employes. The crime of embezzlement involves not only the fraudulent conversion of an employer's money, but also a wrongful betrayal of the trust and confidence reposed by the employer in the employe. The case is also an important one on the part of the defendant, because it involves his personal liberty and his reputation and character. Important to the state especially, perhaps, as it is charged with the grave duty of apprehending and convicting and punishing those who do commit criminal offense, it is equally important to the defendant, because, as I have already suggested, if you should convict him it would take away his personal liberty for a time. I therefore ask your careful and close attention to such instructions as I shall give to you, by which you are to be guided in considering the evidence and arriving at your verdict.[26]

§ 407. Cautioning the Jury—Advice to Agree—Arriving at Verdict by Lot or Chance. (a) Although the verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result you must examine

25—Prescott v. Johnson et al., 91 Minn. 273, 97 N. W. 891, (892).

26—Secor v. State, 118 Wis. 621, 95 N. W. 942, (947).

the questions submitted to you with candor, and with a proper regard and deference to the opinions of each other.[27]

(b) This case has occasioned a great deal of trouble and much cost to the state and county, and has taken up an unusual amount of the time of the court, and it is important, both to the state and defendants, that the jury should arrive at some verdict. The jury should agree on a verdict. No juror from mere pride of opinion hastily formed or expressed should refuse to agree; nor on the other hand should he surrender any conscientious views founded on the evidence. It is the duty of each juror to reason with his fellows concerning the facts with an honest desire to arrive at the truth, and with a view of arriving at a verdict. It should be the object of all the jury to arrive at a common conclusion, and to that end to deliberate together with calmness. It is your duty to agree upon a verdict, if that be possible without a violation of conscientious convictions.[28]

(c) The jury are admonished that there should be no mistrial in this case, if it be possible for the jury to agree upon a verdict, if they can do so without violating their conscientious convictions, based on the evidence. This case has taken up a whole week of this term, and has necessarily been costly to the state and county, and has forced the postponement of other important cases. The jury should therefore lay aside pride of opinion and judgment, examine any differences of opinion there may be among them in a spirit of fairness and candor, reason together and talk over such differences, and harmonize them, if this be possible, so that this case may be disposed of.[29]

(d) Gentlemen, you must not arrive at your verdict by lot or chance, but only by considering the evidence.[30]

§ 408. Each Juror to Be Governed by His Own Conscience, but Should Give Consideration to the Views of His Fellow Jurors; Should Arrive at a Common Understanding. (a) It is the duty of each juryman, while the jury are deliberating upon their verdict, to give careful consideration to the views his fellow jurymen may have to present upon the testimony in the case. He should not shut his

27—People v. Engle, 118 Mich. 287, 76 N. W. 502 (503).

28—Myers et al. v. State, 43 Fla. 500, 31 So. 275 (281). "In the case of Sigsbee v. State (decided at the present term), 43 Fla. 524, 30 So. 816, we had occasion to consider an instruction very similar to the one now under consideration, and upon the authority of the decision in that case we do not think there was any reversible error in giving this instruction."

29—Lankster v. State Ct., 43 Tex. Cr. App. 298, 65 S. W. 388, (391). "We fail to see how it could possibly injure appellant for the court to admonish them that they must try appellant alone on the testimony, and not arrive at their verdict by lot or chance. This was simply an admonition, and, it occurs to us, for his benefit, citing Sargent v. State, 35 Tex. Cr. R. 325, 33 S. W. 364; Rumage v. State —Tex. Cr. App. —, 55 S. W. 64."

30—Sigsbee v. State, 43 Fla. 524, 30 So. 816 (819).

ears, and stubbornly stand upon the position he first takes, regardless of what may be said by the other jurymen. It should be the object of all of you to arrive at a common conclusion, and to that end you should deliberate together with calmness. It is your duty to agree upon a verdict, if that is possible.[31]

(b) Gentlemen of the jury, however, I will charge you that when you go into the jury room you may discuss the case together and compare notes and reason together, but before you make up your verdict you must make up in your own mind, without reference to the other jurors, whether or not the defendant is guilty and if guilty, the degree in which you are to find him guilty. In short, when men are jurors they sit here as individuals, so far as their individual verdict is concerned, and the juror should be governed by his own conscience, and not by the minds and consciences of his fellow jurors.[32]

§ 409. Jury Should Employ All the Reason, Prudence, Judgment, Discrimination and Caution They Possess—Not to Be Actuated by Sentiment. (a) You are instructed that in the performance of this duty, that of scrutinizing the evidence and determining its effect, you should exercise the utmost caution, employ all the reason, prudence and discrimination that you possess, and would summon to your own aid in the most important affairs of life. Having done this, if there then remains in your mind no reasonable doubt of defendant's guilt, you should convict him; otherwise you should acquit him.[33]

(b) I take it that it is unnecessary to say to an intelligent jury that we are not here in the administration of public justice to be actuated by feelings of sentiment. That may do very well outside of this courthouse. But we are here to see that the law which is laid down as a rule of conduct for all citizens is enforced. Whenever a party is charged with violation of law it is my duty to give you the law. It is your duty to apply the facts to the law; and, if the state has established the guilt of the party accused beyond a reasonable doubt, you should find a verdict of guilty, and you cannot allow your judgments, according to your oaths, to be influenced by sentiment or anything of that kind.[34]

§ 410. Attitude of Jury—Common Sense—Belief to Be Reasonable—Elements to Consider. (a) Jurors are not artificial beings, governed by artificial or fine-spun rules; but they should bring to the consideration of the evidence before them their every-day common sense and judgment, as reasonable men; and those just and reasonable inferences and deductions which you, as men, would ordinarily draw

31—Jackson v. State, 91 Wis. 253, 64 N. W. 838, (843). Citing Odette v. State, 90 Wis. 258, 62 N. W. 1054, where this was approved.

32—Simon v. State, 108 Ala. 27, 18 So. 731 (732).

33—Simon v. State, 108 Ala. 27, 18 So. 731.

34—State v. Petsch, 43 S. C. 132, 20 S. E. 993, (995).

from facts and circumstances proven in the case you should draw and act on as jurors.[35]

(b) You are to believe as jurors what you would believe as men, and there is no rule of law that requires you to believe as jurors what you would not believe as men.[36]

§ 411. **What Jury Should Consider.** (a) In determining the issues in this case, you should take into consideration the whole of the evidence, and all the facts and circumstances proved on the trial, giving to the several parts of the evidence such weight as you think they are entitled to. And in determining the weight to be given to the testimony of the several witnesses, you should take into consideration their interest in the event of the suit, if any such is proved, their conduct and demeanor while testifying, their apparent fairness or bias, if any such appears, their appearance on the stand, the reasonableness of the story told by them, and all the evidence and circumstances tending to corroborate or contradict such witnesses, if any such are proved.[37]

(b) You should weigh the evidence carefully, and consider it all together. You should not pick out any particular fact in evidence, or any particular statement of any witness, and give it undue weight. You should give such weight to inferences from the facts proven as in fairness you think they are entitled.[38]

(c) The jury are instructed that the number of witnesses does not necessarily determine the weight of the evidence in any case, but the jury should take into consideration all the evidence in the case and should consider it all together, and determine from all the evidence in the case and from all the circumstances proven on the trial, as to the weight of the evidence, and return a verdict accordingly.[39]

(d) You are to take into account in weighing the testimony of any witness, his interest or want of interest in the result of the case, his appearance upon the witness stand, his manner of testifying, his apparent candor or want of candor, whether he is supported or contradicted by the facts and circumstances in the case as shown by the evidence. You have a right to believe all the testimony of a witness, or believe it in part, or you may reject it altogether, as you may find the evidence to be.[40]

35—State v. Elsham, 70 Iowa 531, 31 N. W. 66, (68).

36—Dodge v. Reynolds et al., 135 Mich. 692, 98 N. W. 737, (738).

37—Evans v. Lipscomb, 31 Ga. 71; French v. Millard, 2 Ohio St. 44; Sellar v. Clelland, 2 Colo. 539; Richardson & Boynton Co. v. Winter, 38 Neb. 288, 56 N. W. 886.

38—Rio G. W. Ry. Co. v. Utah N. Co. et al., 25 Utah 187, 70 Pac. 859 (860).

39—Brown v. People, 65 Ill. App. 58.

40—Dodge v. Reynolds et al., 135 Mich. 692, 98 N. W. 737.

MISCELLANEOUS.

§ 412. Depositions—Weight to Be Given Testimony of Absent Witness. (a) In arriving at your verdict in this case, you should take into consideration all the evidence before you, and you should give the same weight and consideration to the testimony of the plaintiff contained in depositions as you would to said testimony if the same had been given by witnesses in open court before you instead of by deposition.[41]

(b) I charge you, gentlemen of the jury, that testimony taken by deposition should receive the same consideration and weight at the hands of the jury as if the witness had testified on the stand in your presence.[42]

(c) It is your duty under the law to consider the written testimony of the witnesses . . . and give to it the same weight in making up your verdict as if those witnesses had been present in person and testified orally in your hearing.[43]

§ 413. Jury to Find on What Count the Defendant Guilty—Dismissed Counts. (a) The court instructs the jury that if you find the defendant guilty, not on all the counts in the declaration, but only on part, then you should also find on which count or counts you find the defendant guilty.[44]

(b) The court instructs the jury that under the law and the evidence in this case the plaintiff cannot recover on the 2nd and 3rd counts of her declaration, the plaintiff having dismissed as to them.[45]

§ 414. Instruction as to Form of Verdict. The court instructs the jury that if you find the issues for the plaintiff, the form of your verdict may be: "We, the jury, find the defendant guilty and assess the damages at $.....," filling the blank space with whatever amount you may find, if any, writing the same on a separate sheet of paper and signing the same by your foreman.[46]

41—Olcese v. Mobile F. & T. Co., 112 Ill. App. 281, (288). This instruction is in accord with Sec. 34, ch. 51, R. S. of Ill., which reads: "Every deposition may be read as good and competent evidence in the cause in which it shall be taken as if such witness had been present and examined by parol in open court on the hearing or trial thereof." Hogan v. State, 130 Ala. 104.

42—Hogan v. State, 130 Ala. 104, 30 So. 358 (358).

43—Bloomington & Normal Ry. Co. v. Gabbart, 111 Ill. App. 147, (149). See also R. R. Co. v. Dougherty, 170 Ill. 379, 48 N. E. 1000. In Hunt v. Seymour, 147 Ill. 618, it was held that by an admission to avoid a continuance, the other party is entitled to have the testimony of the absent witness received and weighed precisely as though he had appeared as a witness and had sworn to the facts stated in the affidavit.

44—I. C. R. R. Co. v. Andrews, 116 Ill. App. 8, (12).

45—N. C. St. Ry. Co. v. Hutchinson, 191 Ill. 104, affg. 92 Ill. App. 567, 60 N. E. 850.

46—Central Ry. Co. v. Ankiewicz, 213 Ill. 631, 115 Ill. App. 380, (383), 73 N. E. 382. "It is argued that telling the jury to fill the blank space with whatever amount you may find, if any, was equiv-

alent to turning the jury loose to assess plaintiff's damage on whatever basis or theory they saw fit. If such was the effect of the instruction then it was erroneous, as held by us in La Porte v. Wallace, 89 Ill. App. 517, where we reviewed the Illinois cases upon that subject. To the like effect is the later case of Muren Coal & Ice Co. v. Howell, 204 Ill. 515, 68 N. E. 456. But in our judgment this is not an instruction upon the measure of damages, but relates only to the form of the verdict. It is said this would mislead the jury for the reason that there was no instruction upon the measure of damages. There was no such instruction, though one given at defendant's request suggested compensation as the rule. But the law of this state is not, as defendant contends, that the trial judge must see to it that the instructions cover the law of the case, and especially must of his own volition instruct the jury upon the measure of damages. On the contrary, it was held in City of Chicago v. Keefe, 114 Ill. 222, 2 N. E. 267, that a party who permits the jury to retire without an instruction upon the measure of damages cannot afterwards be heard to complain because the court did not instruct as to the law upon that subject. It is a general rule in this state that a party who desires the law upon any particular subject given to the jury should ask an instruction embodying what he conceives the law to be. Druru v. Connell, 177 Ill. 43; 52 N. E. 368; Malott v. Hood, 201 Ill. 202, 66 N. E. 247.

In our judgment the mere failure of both parties to ask any instruction upon the measure of damages cannot convert into an instruction on that subject what was obviously intended by the court as a mere direction upon the form of the verdict if the jury found the issues for the plaintiff. But if the law were otherwise, still, as defendant does not contend in its brief and argument that the damages awarded were excessive, no harm was done by a failure to instruct on that subject, or even by the instruction in question, if it were open to the construction defendant seeks to put upon it." From the opinion in the Appellate Court, which was later affirmed by the Supreme Court of Illinois.

CHAPTER XXIV.

ACCOUNT STATED.

See Erroneous Instructions, same chapter head, Vol. III.

§ 415. Statement Rendered and Payments Made Thereon Becomes an Account Stated. The court instructs the jury as a matter of law that where an itemized statement of account is by the creditor delivered to the debtor showing the aggregate charges in the creditor's favor and the proper credits thereon and the debtor retains said statement of account and makes payment upon it without objection, it thereby becomes an account stated between the parties.[1]

§ 416. Account Must Be Left with Defendant, not Merely Exhibited to Him. Although you may believe from the evidence that some time about, etc., the plaintiff made out a statement of account including items on both sides of the account, and struck what he called a balance and showed the same to the defendant and requested him to make payment thereon—and further, that the defendant made no objection to the statement of account at that time, this alone would not be sufficient to constitute an account stated, provided that you further believe from the evidence that the plaintiff did not leave the statement with the defendant and that no balance was in fact agreed upon by the parties or assented to by the defendant as the amount due from one party to the other.[2]

1—Poppers v. Schoenfeld, 97 Ill. App. 477 (481).

2—Payne v. Walker, 26 Mich. 60.

§ 417. **Account Rendered Kept an Unreasonable Time or not Objected to, is Admitted.** (a) Where a party sends, by mail, a statement of account to another with whom he has dealings, which is received, but not replied to within a reasonable time, the acquiescence of the party is taken as an admission that the account is correctly stated; and what is a reasonable time in this connection is a question for the jury to determine, under all the circumstances of the case, considering the nature of the business, the distance of the parties from each other, and the means of communication between them.[3]

(b) When two parties have a running account, and one makes a statement of the account and sends it to the other, by mail, and the latter keeps it an unreasonable time, without making any objection to it, he must be held to have consented to its being correct, and he will not afterwards be permitted to question its correctness, unless he can show that there is some error, mistake or fraud in the account, of which he was ignorant when he so consented to it.[4]

§ 418. **Must Be Agreed to, but Acquiescence Need not Be Stated in Express Terms.** (a) In order to constitute an account stated it must appear from the evidence that the parties either expressly or impliedly agreed upon a balance due. And although you may believe from the evidence that at the time in question the parties got together and looked over their accounts and struck a balance this would not be binding upon the parties as an account stated unless you further believe from the evidence that both the parties then agreed or understood, that such balance should be regarded as the amount due from the defendant to the plaintiff.[5]

(b) The jury are instructed, that in order to constitute an account stated, it is not necessary that the admission of the parties, that the balance struck is correct, should be made in express terms. If a creditor has rendered his account to the debtor, exhibiting the items thereof, and the amount due thereby, and the account is not objected to by the debtor within a reasonable time, the acquiescence of the debtor therein is to be taken as an admission that the account was truly stated.[6]

§ 419. **Account Rendered and Acquiesced in Becomes a Stated Account and is Conclusive Excepting for Mistake or Fraud.** (a) When two parties have running accounts with each other, and a statement of the account is made by one party and submitted to the other, and the latter acquiesces in its correctness, the law will regard it as a stated account, by which both parties will be bound, unless it can be shown that some error or mistake has been made, or

3—Bailey v. Bensley, 87 Ill. 556; Darby v. Lastrapes, 28 L. Ann. 605; Powers v. P. Rd. Co., 65 Mo. 658.

4—Freas v. Fruitt, 2 Col. T. 489.

5—Reinhardt v. Hines, 51 Miss. 344; Cape G. Rd. Co. v. Kimmel, 58 Mo. 83; Stenton v. Jerome, 54 N. Y. 408.

6—Powell v. P. R. R., 65 Mo. 658;

fraud practiced; and the burden of proving the error, mistake or fraud, is on the party alleging it.[7]

(b) Although you may believe, from the evidence, that the plaintiff sent, and the defendant received, the accounts of sales read in evidence on this trial, and that the defendant made no objection to them at the time they were received, still, if you further believe, from the evidence, that said accounts of sales contained erroneous charges or false accounts, and that the plaintiff knowingly concealed from the defendant the fact of their being erroneous or false, and that the defendant did not, and could not, by the exercise of reasonable care, have ascertained or discovered such errors or false statements, then a failure on his part to object to said accounts, at the time of receiving them, does not in law estop him from afterwards showing the truth in reference to the matters contained in such statements.[8]

§ 420. Can Only Be Opened for Fraud or Mistake. (a) If you believe, from the evidence, that some time on or about, etc., the parties to this suit met and looked over their accounts together, and settled all matters between them, and struck a balance and agreed upon that as the amount due from one to the other, then, in the absence of mistake or fraud, neither party will be allowed to go behind that settlement for the purpose of increasing or diminishing the amount so agreed upon.[9]

(b) You are instructed, that when two parties have a settlement and adjust all their accounts, and agree upon the balance due, neither party can afterwards open the settlement without first showing that there was some fraud practiced on him, or a mistake made by both parties; and the burden of proof is upon the party wishing to open the settlement, to show, by a preponderance of evidence, that there was a fraud practiced upon him, or that the parties were laboring under a mistake in relation to some matter of fact which entered into, or affected the settlement.[10]

§ 421. Same; Conclusive in Absence of Mistake or Fraud. You are instructed that if you believe from the evidence that from time to time the officers or agents of the plaintiff and defendant in this suit met and looked over their accounts together and settled all matters between them and struck a balance, and agreed upon that as the amount due from one to the other, then in the absence of mistake or fraud, neither party will be allowed to go behind that set-

1 Greenleaf Ev., Sec. 197; Freeland v. Heron, 7 Cranch 147; Hayes v. Kelley, 116 Mass. 300.

7—Bradley v. Richardson, 2 Blackf. (U. S.), 354.

8—Vandever v. Stalesir, 39 N. J. Law 593; Petut v. Crawford, 51 Miss. 43; Anthony v. Day, 52 Howard N. Y. Pr. 35; Duffy v. Hickey, 63 Wis. 312, 53 Am. Rep. 292.

9—1 Am. & Eng. Ency., 2d ed., 460.

10—Quinlan v. Keiser, 66 Mo. 603; Wilson v. Frisby, 57 Ga. 269; Hawskins v. Long, 74 N. C. 781; Kronenberger v. Bing, 55 Mo. 121, 17 Am. Rep. 645; White v. Campbell, 25 Mich. 463.

tlement for the purpose of increasing or diminishing the amount so agreed upon.[11]

§ 422. **Stated Account Void for Error or Want of Consideration.** (a) I charge you, gentlemen of the jury, that, if you believe there was a stated account between the plaintiff and defendant in this case, that this fact would not preclude the defendant from showing either that the said account was either incorrect or void for want of consideration.

(b) I charge you, gentlemen of the jury, that if you believe from the evidence in this case that the claim of W. M. against the defendant in this case, and sued on in this case, was absolutely and clearly unsustainable at law or equity, its compromise would constitute no sufficient legal consideration, and any promise of the defendant afterwards made either to W. M. or the plaintiff in this case, made in a spirit of compromise, would be void for want of consideration.[12]

§ 423. **Account; Settlement; Material Mistake; Fraud; Proof Required.** When parties who have had business transactions between themselves, meet and make settlement of such transactions, the law presumes that such settlement is fair and legal, and one seeking to annul and set aside such settlement by suit, in order to do so successfully, must show by a preponderance of the evidence that a material mistake was made in such settlement to his prejudice, or that there was fraud or coercion, violence, or a threat of such, committed on the part of the other party in making such settlement, and such suit should be brought in a reasonable time. If you find from the evidence that the plaintiff and defendant had a settlement of their business transactions in the month of ————, and in which settlement the property and items mentioned in the account sued on herein, were considered and accounted for, then your verdict should be for the defendant, unless you find from a preponderance of the evidence that there was a material mistake made in such settlement to the prejudice of the plaintiff, by the omission of one or more items of their business transactions, or that there was fraud or coercion, or violence, or threats of such, committed by the defendant. In arriving at your verdict you are to be governed alone by what was done and said by the parties at the time of the settlement made, if you find that one was made, and the items included in said settlement, which are included in the account sued on herein.[13]

§ 424. **Settlement and Receipt Obtained by Duress.** If you believe, from the evidence, that at the time of the alleged settlement between the parties, and when the receipt in question was given, the

11—Gottfried Brewing Co. v. Szarkowski, 79 Ill. App. 583 (584).

12—Ivy Coal & Coke Co. v. Long, 139 Ala. 535, 36 So. 722 (723).

13—Russell v. Stewart, — Ark. —, 94 S. W. 49.

plaintiff was in embarrassed circumstances financially, and that he had money due to him from the defendant and from other persons, and that he was dependent upon receiving prompt pay from the defendant and from such other persons, to save himself from serious loss or financial ruin, that defendant knew all this, and if the jury further believe, from the evidence, that the plaintiff then claimed that there was due to him from the defendant a much larger sum than ($1,000), and that the defendant for the purpose of compelling plaintiff to accept ($1,000) in full, of the amount so claimed by him, refused to pay the plaintiff any portion of what was due, except upon condition that the plaintiff should accept the ($1,000) in full payment, and give a receipt in full of all demands, and also threatened to take steps to stop payment to plaintiff by the other persons so indebted to him, and that by these means the plaintiff was induced against his free will and consent to accept the ($1,000) and to give the receipt in full, then the plaintiff was not bound by such alleged settlement nor by the receipt as a receipt in full.[14]

§ 425. **Receipt Prima Facie Correct.** The jury are instructed, that a receipt which says on its face that it is a receipt in full, must be taken to be in full of all matters which were claimed, or could have been brought forward at the time it was given, unless it appears, by a preponderance of the evidence, that some item or matter of claim was omitted by mistake of the parties, or by the fraud of the person taking the receipt.[15]

§ 426. **Contradicting Receipt.** The court instructs the jury that a receipt is but prima facie evidence of payment, and may be contradicted by parol testimony; and if the jury believe, from the evidence, that the plaintiff did the extra work for which this suit is brought, at the request of the defendant, expressed or implied, and that defendant has not been paid for the same, and further, that the receipt introduced in evidence was not intended to cover that item, or that the item was overlooked, and by the mistake of the parties not included in the settlement when the receipt was given, then the jury should find for the plaintiff as to that item.[16]

§ 427. **Settlement Presumed to Include all Items.** If you believe, from the evidence, that some time about, etc., the plaintiff and defendant met together, and looked over their accounts for the purpose of settling the same, and that they then settled and agreed upon a balance due, then the law will presume that such settlement embraced all the items that each had against the other that were then due; and in such case it devolves upon the party asserting the con-

14—Vyne v. Glenn, 41 Mich. 112, 1 N. W. 997; Sholey v. Mumford, 60 N. Y. 498; Stenton v. Jerome, 54 N. Y. 480.

15—1 Greenl. Ev. § 212; Sherman v. Crosby, 11 Johns. 70.

16—2 Pars. on Cont. 555; 1 Greenl. Ev. § 305; Branch v. Dawson, 36 Minn. 193, 30 N. W. 545.

trary to prove, by a preponderance of evidence, that the item, etc., was omitted by consent of the parties, or by accident and unintentionally, or by the fraud of the other party.[17]

§ 428. **Accepting and Retaining a Less Amount Offered in Payment of a Disputed Claim.** (a) Now, if the jury find that there was a dispute between plaintiff and defendant as to the amount, and that defendant, through his agent, tendered to plaintiff a certain amount, in New York exchange, conditioned that the same was tendered only as a full and complete satisfaction of all plaintiff's claims against defendant by reason of said cattle transaction, and if you further find that plaintiff, fully understanding that said amount was so tendered and conditioned on defendant's part, accepted, with or without protest, and retained, the amount so tendered in New York exchange, you will find for the defendant.[18]

(b) Gentlemen of the jury, you are instructed that if you find from the evidence that there was a dispute in good faith between the board of county commissioners of defendant county and the plaintiffs as to the amount justly due them under said contract, and that said dispute was settled by such county board agreeing to allow and pay, and the said plaintiffs to accept and receive, ——— in full settlement and satisfaction of said claim, and that in pursuance of said claim, and that in pursuance of such settlement and agreement, such sum or money was allowed by such board, and paid to and received by said plaintiffs, then said plaintiffs cannot recover in this action, and your verdict should be for the defendant.

(c) And you are further instructed that if you find from the evidence that there was a disagreement in good faith between the plaintiffs and said board of county commissioners with respect of the amount due and owing said plaintiffs under said contract, and that said board proposed to allow and pay to them the sum of ——— in full satisfaction and settlement of said claim, that then it was optional with said plaintiffs to accept said sum or to refuse the same. But, if you further find that said plaintiffs exercised such option by accepting such allowance and receiving such sum, then they would be bound by the condition that such allowance and payment was in full satisfaction and settlement of said claim, to the same extent that they would have been bound had they expressly agreed to such condition; and this would be true even as against any secret or expressed intentions to the contrary, or any protests then or subsequently made.[19]

§ 429. **Action for Money Loaned—Itemized Account of Indebtedness.** If the jurors believe and find from the evidence that the plain-

17—Straubher v. Mohler, 80 Ill. 21; Allrecht v. Gies, 33 Mich. 289.

18—Daugherty v. Herndon, 27 Tex. Civ. App. 75, 65 S. W. 891.

19—Green v. Lancaster County, 61 Neb. 473, 85 N. W. 439 (441).

tiff loaned to the defendant the amounts of money itemized in her account sued on, and that the credits given to defendant as shown by said account are for payments made to plaintiff on account of defendant's indebtedness to her, and that the amounts and dates as stated in said account are correct, then your verdict should be for the plaintiff in such sum as you believe and find from the evidence that the defendant is indebted to plaintiff, not exceeding ——— dollars, the amount sued for.[20]

20—Stephan v. Metzger, 95 Mo. 609, 69 S. W. 625 (627).

CHAPTER XXV.

ADVERSE POSSESSION.

See Erroneous Instructions, same chapter head in Vol. III.

§ 430. Adverse Possession Defined. You are instructed that adverse possession sufficient to defeat a legal title must be hostile in its inception and continue uninterruptedly for ten years. It must also be open, notorious, adverse, and exclusive, and must be held dur-

ing all such time under a claim of ownership by the occupant; and all of these facts must be proved by a preponderance of the evidence.[1]

§ 431. **What Constitutes Adverse Possession.** (a) The person who has been in the adverse possession of a tract of land, and in person and by his grantors, continuously for more than ten years before the commencement of an action to eject him therefrom becomes the owner thereof, regardless of whether he had originally any title thereto or not. To constitute adverse possession such as to invest a party claiming it with title to and right of possession of the land in dispute, the possession must have been open, visible, notorious, exclusive and adverse for more than ten years before the commencement of this action. The possession must have been such as was consistent with the nature of the property, and is indicative of an honest claim of ownership thereof; and if you find from the evidence in this case that M. E. by herself and her grantors, J. H., J. E. and C. E., was for more than ten years continuously before the commencement of this case, to-wit, the —— day of ————, in the open, visible, notorious, exclusive, adverse possession of the premises in dispute, claiming to own the same, your verdict must be for the defendant.[2]

1—Hoffine v. Ewing, 60 Neb. 729, 84 N. W. 93. The court said: "The authorities are uniform, and grounded on fundamental principles, to the effect that such possession must be in opposition and adverse to the constructive possession of the holder of the legal title. It must be under a claim of ownership which is inimical to the possession of the legal proprietor and all others. In Horbach v. Miller, 4 Neb. 31, 48, which may be regarded as the parent case on the subject in this state, an instruction 'that if they (the jury) believe from the evidence that the plaintiff in error for ten years next before the commencement of the action was in the actual, continued, and notorious possession of the land in controversy, claiming the same as his own against all persons, they must find for the plaintiff in error, was approved as a correct statement of the law. 'The possession must be inconsistent with the title of the true owner, and not subject to the rights of other parties.' Gatling v. Lane, 17 Neb. 77 (79), 22 N. W. 227. 'Such possession, when adverse, is sufficient, if actual, open, notorious, and exclusive, to give the party in possession title to the property.' Crawford v. Galloway, 29 Neb. 261 (267), 45 N. W. 629. 'It is necessary that he should actually hold the land as his own during that period, in opposition to the constructive possession of the legal proprietor.' In Smith v. Hitchcock, 38 Neb. 104, 56 N. W. 791, the court says: 'To constitute her possession or occupancy adverse, she must have actually held and occupied the property as her own, and in opposition and hostility to the concurrent and constructive possession of the owner of the legal title. There is no evidence in the record that establishes or tends to establish . . . that she ever held after her entry in hostility to the defendant in error.' Says Lake, C. J., in Roggencamp v. Converse, 15 Neb. 105 (108), 17 N. W. 361: 'They claimed on the trial, and produced an abundance of evidence to show, that the plaintiff's possession was simply as lessee under the title conveyed by the deed, and not in hostility to it.' From the excerpts above given, the view of this court as to the character and requisites of the possession required in order to obtain title is readily discernible."

2—Baty v. Elrod et al., 66 Neb. 735, 92 N. W. 1032 (1033).

(b) If you believe from the evidence that the defendant, ————, no less than ten years prior to the commencement of this suit, entered into possession of the lands in controversy, and cultivated said lands or fenced the same, or erected improvements of any kind thereon, or did other acts of such character as to clearly show that he was occupying said lands and claiming the same as his own, and during all of said ten years continued to so occupy said lands, claiming during all of said time to be the owner of the same, and never during any of said period of ten years abandoning said lands, but during all of said time continued openly, notoriously, adversely, and exclusively to occupy and claim the same as his lands, then you are instructed that said acts on the part of said defendant, would constitute adverse possession, within the meaning of the law, and would entitle the defendant to a verdict at your hands. But if the defendant has failed to establish any of said acts by a preponderance of the evidence, your verdict should be for the plaintiff.[3]

§ 432. **Proof Required—Acquiescence—Open and Notorious.** (a) Adverse possession is not to be made out by inference, but by clear and positive proof.

(b) The question for you is whether the defendants, and those under whom they claim, have had for a period of fifteen years actual, open, and exclusive adverse occupancy and possession of the land claimed to be owned by the plaintiff; such adverse possession being known and acquiesced in by the real owner, or so far notorious as to be presumptively within his knowledge.[4]

§ 433. **Notice by Possession.** (a) That where a person is in the actual, open and notorious possession of land, claiming to own the same, this would afford notice to the world of all his rights and equities in the same.[5]

(b) That when a party is in the actual, open and visible possession of land, under an unrecorded deed, his possession will afford notice to the world of his rights to the land, whatever they may be,

3—In Hoffine v. Ewing, 60 Neb. 729, 84 N. W. 93, the court says: "The facts which are to be proven by a preponderance of the evidence are those necessary for the defendant to establish in order to make out his case under the pleadings. It required that the proof should preponderate in his favor as to adverse possession being taken ten years prior to the commencement of the suit; that at the beginning, and under the possession thus entered into, the defendant did some act or acts—either one or more of those mentioned in the instruction—of a character to clearly show that he claimed the land as the owner; that during such period he did not abandon his possession, but during all the time continued openly, notoriously, adversely, and exclusively to occupy and claim the property as his own. This, we think, is substantially the effect of the instruction, and these facts we regard as essential elements to be established by a preponderance of the evidence in order to justify a verdict for the defendant."

4—Merwin v. Morris, 71 Conn. 555, 42 Atl. 855.

5—Strong v. Shea, 83 Ill. 575; Franklin v. Newsome, 53 Ga. 580.

equally with that which would have been given by the recording of his deed.[6]

§ 434. **Possession, Necessary Elements of.** The court instructs the jury, if you believe, from the preponderance of the evidence, that the grantors of the plaintiff held open, notorious, adverse, hostile, peaceable, uninterrupted and continued possession of the land in question for some time under claim of ownership thereto, and that they conveyed one from another down to the plaintiff herein, and that under said conveyance the plaintiff took possession of the land in question and held the open, notorious, adverse, hostile, peaceable, uninterrupted and continuous possession thereof, under claim of ownership, from the time of such conveyance to the time it is alleged in the declaration that the defendant took possession thereof, and that such possession of the said grantors of the plaintiff and the possession of the plaintiff together amount to a period of twenty years or more prior to the time it is alleged in the declaration that the plaintiff took possession thereof, then the plaintiff would be the absolute owner of said land; then, if you further believe, from the preponderance of the evidence, that the defendant took and unlawfully withheld from the plaintiff the possession thereof, as alleged in the declaration, then you should find a verdict for the plaintiff.[7]

§ 435. **Permissive Possession not Hostile—Must be Hostile in its Inception.** (a) Although you may believe, from the evidence, that one A. B., more than twenty years before the commencement of this suit, built a fence around the land in question (or otherwise improved it), this alone does not show adverse possession in him. To constitute adverse possession, it must further appear, from the evidence, that what he did on the land was not with the leave or permission of the owner, but was done under a claim of right in himself, and in hostility to the right of the owner.[8]

(b) The jury are instructed, that if a person enter into the possession of the lands of another, with the consent of the owner, for any other purpose except to claim the land as his own, such possession alone, no matter how long it is continued, will never bar the right of the owner to take possession of his land when he sees fit to do so.[9]

§ 436. **Possession Subservient to the True Owner.** Where possession of real estate is taken under a claim consistent with or in subordination to the title of the real owner, nothing but a clear, unequivocal and notorious disclaimer of the title of such owner will render such possession adverse.[10]

§ 437. **What Acts Constitute Possession—Occasional Use—Physical Occupation—Acquiescence.** (a) The possession of land may be

6—Walden v. Gridley, 36 Ill. 523; Spitler v. Scofield, 43 Ia. 571.

7—Laurance v. Goodwin, 170 Ill. 390 (395), 48 N. E. 903.

8—Russell v. Davis, 38 Conn. 562; Foster v. Letz, 86 Ill. 412. See Fox v. Spears, — Ark. —, 93 S. W. 560.

9—Collins v. Johnson, 57 Ala. 304.

10—Newell on Eject. 767; Tyler on Eject. 217.

held in different modes—by inclosure, by cultivation, by the erection of buildings or other improvements, or in any mode that clearly indicates an exclusive appropriation of the property by the person claiming to hold it.[11]

(b) That where land is appropriated to such uses as it is naturally fitted for, and the manner in which it is used, by the persons claiming title, is such as to notify the public that such person has asserted dominion over it, this will constitute possession.[12]

(c) An occasional use of the land, such as the occasional cutting of grass or firewood, will not be sufficient to establish adverse possession.

(d) But neither physical occupation, cultivation, nor residence is necessary to constitute actual adverse possession, when the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the property has been evidenced by open, visible, continuous acts of ownership, known to and acquiesced in by the real owner, or so far notorious as to be presumed to be within his knowledge.[13]

(e) The jury are instructed that under the issues in this case the burden of proof rests upon the plaintiff, and before it can recover any of the lots in controversy from the defendant, the plaintiff must show to the satisfaction of the jury, and by a preponderance of evidence, a right to them superior and better than that of the defendant. Unless the plaintiff has succeeded in doing this the jury should return a verdict in favor of the defendant.

(f) In his answer to the plaintiff's petition the defendant, H., has interposed as a defense the statute of limitations, by which he asserts, in effect, that the lots in controversy have been under his control and occupancy for the full period of ten years next before this suit for the possession was commenced. And if the jury shall find from the evidence that as to the lots in controversy, or any of them, H. had been in the undisturbed, actual, open, and exclusive occupation and control, either personally or by his servants, agents or lessees for ten years next before the commencement of this action, (which was ————), and under a claim of ownership, then, in that case, the defendant is entitled to a verdict in his favor as to all of the lots so occupied and controlled by him.

(g) No particular act or series of acts were necessary to be done on the land by H. in order to make his possession actual and available to him in this case as a defense. Any visible or notorious acts which the jury may find from the evidence clearly show an intention on his part to claim ownership and possession will be sufficient to establish his claim of adverse possession; and such acts are equally available to him, whether they were done either personally or by his lessees or other privies or agents.

11—Truesdale v. Ford, 37 Ill. 210.
12—Hubbard v. Kiddo, 87 Ill. 578.
13—Merwin v. Morris, 71 Conn. 555, 42 Atl. 855.

(h) Adverse possession may be evidenced by such use of the lots in question by H. or his privies as would indicate to a passerby, and to the owner if he went to them, that they were used and claimed by some one.

(i) The jury are instructed that it is not necessary that one who takes possession of lands or lots, and holds the same adversely to the owner, should have a deed or other written evidence of title in order to cause the statute of limitations to run in his favor; but it is sufficient if he take actual, open possession, under a claim of ownership, and continue it for the full period of ten years. If he do so, his title and ownership are complete.

(j) If, as to any of the lots in controversy, the jury shall find that H. took actual possession, and either in person, or by another person or persons, as his agents or lessees, held such possession for a time, and then sold his right to another, who continued in actual possession, and from whom he has since purchased it back, H. may avail himself of their several occupancies in this action, provided that, taken together, they continued uninterruptedly for ten years.

(k) If the jury find that H., by himself or his employes, lessees or privies, has had exclusive control and actual occupancy of said lots, or any of them, under a claim of ownership for the full period of ten years next before the commencement of this suit, the fact that he may have occupied or had inclosed with them other grounds, or even portions of the public streets, would not of itself be sufficient to prevent a recovery by the defendant as to such lots, provided the defendant exercised such acts of ownership and control over such lots as to indicate clearly his intention to claim the same as if his fence had inclosed only said lots, and, as to lots so occupied and controlled, the jury should find in favor of the defendant.[14]

14—The above series of instructions on adverse possession was approved in Omaha & Florence Land & Trust Co. v. Hansen, 32 Neb. 449, 49 N. W. 456 (457).

The court said: "In order to give security to titles, the legislature, nearly 30 years ago, fixed 10 years as the period within which an action to recover the possession of land should be brought. The construction of this statute has been considered in many cases by this court, and the uniform holding has been that the statute is one of repose; that if a party establish in himself, or in connection with those under whom he claims an actual, notorious, continuous possession of land as owner for a period of 10 years, he thereby acquires an absolute title to the land; and this irrespective of any question of motive or mistake. Neither does the purchase of a tax-deed break the continuity of a possession. Griffith v. Smith, 42 Neb. 749, 42 N. W. Rep. 749.

"Cases may be found which hold that the purchase of such title breaks the continuity. We cannot agree, however, that such is the case. A party in possession of land as owner certainly has a right to protect that possession by the purchase of any outstanding claim or lien against the property. There is not thereby any break in the possession, nor does the adverse occupant rely upon his purchased title in preference to the one which he previously possessed. He joins the two together, and possesses whatever title both may give him. There is no error, therefore, in the instructions given on behalf of the defendant, and they conform to the proof. It is evi-

§ 438. Color of Title Defined—Plaintiff Entitled to Use as Against One Who has no Title. (a) The court instructs you that color of title is anything which shows the extent of the occupant's claim, not only of a deed or plat, but fences, hedges, or marked lines may be sufficient evidence of the extent of the claim, and herein constistutes color of title.[15]

(b) The court instructs you that where, in an action like this, it is shown by a plaintiff that his or her deed covers a certain tract of land, then such plaintiff is said to have color of title to such land, and it follows, as a matter of law and right, that such plaintiff is entitled to the use and occupation of such land as against anyone who has no title to the same.[16]

§ 439. Quit Claim Deed Sufficient Color of Title—Cutting Timber While in Possession. The court instructs the jury that the quit claim deed from the ———— Co. to M., one of the defendants in this case, embracing the land in dispute, is sufficient to constitute color of title in defendants; and you are further instructed that if you find from the evidence that defendants, after obtaining said deed, entered into actual, continuous, visible possession of said lands, and so remained in possession thereof until the institution of the plaintiff's action herein, claiming the same adversely to the plaintiff, and that the said timber and trees were by the defendants cut down and removed from the said lands by the defendants when they were thus in possession of the said lands, then you will find the issues for the defendants.[17]

§ 440. Holding Adversely Under Claim of Taxes Paid. If the jury find from the evidence that W. D., the ancestor of the defendants, bought at a tax sale held by the late corporation of ————, so called, the property in controversy in this case and paid the price bid by him at such sale and received from the corporation of ———— a deed to said property, which was by him duly filed for record and recorded in the land records of the ———— more than twenty years prior to the commencement of this suit; and thereupon the said property was assessed to the said W. D. on the tax books of the city of ———— and the taxes thereupon from that time until the beginning of this suit paid by the said W. D. or his successors in title, the defendants in this case; that at a period of time more than twenty years before the commencement of this suit the said property was rented in behalf of the defendants to a person who took the same and held possession thereof as tenant of the de-

dent that there is no material error in the record." Where instructions are approved as a series it does not follow that each instruction if taken alone would meet the approval of the court-author.

15—Connor v. Johnson, 59 S. C. 115, 37 S. E. 240 (245).

16—Id.

17—Holliday-K. L. & L. Co. v. Markham, — Mo. App. —, 75 S. W. 1121.

fendants for the purposes of a stone yard, paying rent therefor from the date of making such arrangement with the defendants, and that, although the said property was inclosed by a fence, yet the person so renting the same, either upon the whole or a part thereof, during his occupancy, deposited stone used by him in his business, and that such use and possession of the said property was continued by the occupant thereof actually, adversely and uninterruptedly for a period of twenty years next before the commencement of this suit, then the jury is instructed that the defendants are entitled to recover.[18]

§ 441. **Possession Under Color of Title—Actual Possession Defined.** The court instructs you that if J. was in possession of this land under the color of title the plaintiff cannot recover unless he proves actual possession, and merely including land of a plat or deed is not actual possession. Actual possession is such an entry and holding of land as would make the party liable for damages if his entry was unlawful.[19]

§ 442. **Adverse Possession—Fraud—Color of Title—Intent—Extent Occupied—Not Secret, but Open.** (a) The court charges the jury that the law abhors a fraud.

(b) The court charges the jury that the possession of land which the law protects is open and notorious possession, and not a secret or furtive possession.

(c) The court charges the jury that if adverse possession is held without color of title, such possession is limited to the portion actually occupied; and if the deed from D. A. G. was not actually made until 1894, then E.'s possession prior to the time is limited to the part actually occupied by him.

(d) The court charges the jury that if at the time the deed from G. to E. was executed the defendant or those under whom it claimed was in the adverse possession of said land, then said deed from G. was void as evidence of title.

(e) The court charges you that the idea of adverse possession is inconsistent with and repugnant to the idea of a secret or furtive possession.

(f) The court charges the jury that if E. and G. made the G. deed in 1894, and dated it back to 1867, it was a gross fraud if E. intended to use such deed as a color of title since 1867 against the defendant.

(g) The court charges you that to constitute adverse possession there must be an actual claim of present ownership, accompanied with possession, and a possession with mere intent to claim it in the future is not adverse possession.[20]

18—Holtzman v. Douglas, 168 U. S. 278 (285), 18 S. Ct. Rep. 65.

19—Connor v. Johnson, 59 S. C. 115, 37 S. E. 240 (245).

20—The above series of instructions was approved in Edmondson v. Anniston City Land Co., 128 Ala. 589, 29 So. 596 (598). "This charge was not abstract as there was evidence to support it. If it

§ 443. **Defendant Attempting to Justify Entry Against Plaintiff, Who has Color of Title, Assumes Burden of Proof—Facts He Must Prove to Be Relieved from Liability.** The court instructs you that where a defendant, in a case like this, undertakes to justify his entry upon land in possession of a plaintiff, who has color of title to the same, the burden of proof is upon him, and, before he can relieve himself from liability, he must satisfy the jury, by the preponderance of the evidence, of one or the other of the following facts: First, that he entered on such land with the consent of the plaintiff; or, second, that he was in possession of such land under color of title; or, third, that he has a good title to such land.[21]

§ 444. **Adverse Possession—Must Recover Upon Strength of Own Title—Burden of Proof.** (a) Under the pleadings, the law, and the evidence in this case, the only question for your consideration is the question of adverse possession of the property in controversy set up by the defendant, in his answer herein, wherein he alleges that he has been in the actual, open, notorious, and exclusive possession of the land in controversy, claiming the same adversely to the plaintiff and all the world, for more than ten years next before the commencement of this action; and the burden is upon the defendant to establish such defense by a preponderance of the evidence.[22]

(b) The court charges the jury that the plaintiff must recover if at all, upon the strength of his own title, and therefore if he has failed to satisfy the jury by a preponderance of the evidence that the land claimed by him is covered by his deed you should answer the first issue "No." If the jury find that the plaintiff's deed covers the land in dispute, you should answer the first issue, "Yes," unless the defendant has satisfied you by a preponderance of the evidence that he has been in the actual and adverse possession thereof, under known and visible boundaries, for 20 years next prior to the date of the commencement of this action.[23]

(c) Now, you have heard the old saying that "Possession is nine points in the law," and it is well that it is so. The law presumes that those in possession are rightfully in possession, and he who claims that they are unlawfully in possession has to satisfy the jury by the preponderance of the evidence that he has a good

had any misleading tendency it was the duty of the plaintiff to have counteracted such tendency by asking an explanatory or qualifying charge. A charge which asserts a correct legal proposition does not constitute a reversible error, though such charge under the facts of the case may have a tendency to mislead; but if the other party apprehends that such charge was misleading he should request an explanatory charge. Pullman Palace Car Co. v. Adams, 120 Ala. 584, 24 So. 921, 74 Am. St. Rep. 53, 45 L. R. A. 767; Chandler v. Jost, 96 Ala. 596, 11 So. 636; Miller v. State, 54 Ala. 155."

21—Connor v. Johnson, 59 S. C. 115, 37 S. E. 240.

22—Hoffine v. Ewing, 60 Neb. 729, 84 N. W. 93.

23—Pittman v. Weeks, 132 N. C. 81, 43 S. E. 582.

title, and a better title than the defendant. He is to recover by the strength of his own title.[24]

(d) If a plaintiff, in a case like this, shows that he or she is in possession under color of title of a tract of land, and a defendant comes in and undertakes to justify an entry thereon under a deed from a former owner, the burden of proof is upon him, and, in order to relieve himself from liability, he must show, by the preponderance of the evidence, that his deed does cover such land, and, if he does not do so, the verdict must be against him.[25]

§ 445. **Assuming Title in Mesne Grantor.** The court instructs the jury that if they believe, from the evidence, that J. N. purchased the lot in question from D. K., on the first day of ————, and that the plaintiffs in the declaration named are the heirs at law of J. N., they must find for the plaintiff, unless they shall be satisfied, from the evidence, that S. D., the defendant in this suit, under a claim or color of title, has had actual, open, visible, continuous, exclusive, notorious, and uninterrupted possession of the said lot for a period of fifteen consecutive years at some time previous to the institution of the suit.[26]

§ 446. **Adverse Possession—Elements Constituting—Surveys—Land Covered by Water—Homestead.** If you find that the defendant—and his grantors—have been for a period of more than fifteen years next before the commencement of this suit, ————, in actual, continued, visible, notorious, distinct and hostile possession of the land in dispute, then your verdict should be for the defendants, because such long-continued adverse possession gives just as good a title as a deed. You are instructed that when possession is by actual occupation of the land in question or by tenants under claim of title in the landlord, the possession is visible, open, notorious, and distinct, and will be presumed to be hostile. The actual, continued, visible, notorious, and hostile possession of land is tantamount to a claim of ownership. If you find that the defendant and his predecessors successively have maintained adverse possession for more than fifteen years up to the east line of the disputed tract, or up to the fence in question, then it is entirely immaterial whether the fence or the east line of the disputed tract is on the surveyed line run originally by the United States government surveyor as a dividing line between private land claims 105 and 106. A part of this strip of land in question is land covered by water, or what is called "water frontage." You are instructed that it is not necessary that ———— and his successive grantors should have held this water front actually in possession, or have of the water front what the law calls "possessio pedis," or possession of the foot. Such possession is only required

24—Sutton v. Clark, 59 S. C. 442, 38 S. E. 150, 82 Am. St. Rep. 848.

25—Connor v. Johnson, 59 S. C. 115, 37 S. E. 240.

26—Atkinson v. Smith, — W. Va. —, 24 S. E. 901.

in the case of the solid land, or the upland; and, accordingly, if you find that the defendant has had adverse possession, as hereinbefore explained to you, of the upland for the statutory period of fifteen years, this adverse possession of the upland would carry with it the enjoyment of the riparian rights as to the land under the water, so far out as the ownership goes for anybody, without any proof further whatever of adverse possession of the water front, or land under the water. You are instructed that it is the law that in retracing the lines of a former survey that course and distance shown by the field notes of the former survey must yield to the original artificial or natural monuments. The undisputed testimony shows that ——— and his wife, ———, occupied the land north of Portage avenue as a homestead at the time of the alleged conversation stated to have occurred between ——— and ———. You are instructed that ——— could not incumber, bind, or convey any portion of his homestead without the consent in writing of his wife and you are instructed that there is no evidence of such written consent in this case.[27]

§ 447. **Adverse Possession—Limitation—Abandonment.** (a) If the jury believe from the evidence that the defendant entered into possession of the lands in suit prior to the year 1876, and continued in possession thereof until 1889, and used and occupied the same continuously between said dates openly, notoriously, and under claim of ownership, the jury should return a verdict in favor of the defendant.

(b) If the jury believe from the evidence that the defendant had, prior to —— been in open, notorious, and continuous possession of the land in suit, claiming to own it, for more than ten years, and did not during such time recognize the title or ownership of anyone else of said land, then the jury should return a verdict for the defendant, whether the defendant recognized title in the plaintiff in the fall of —— and subsequently or not.

(c) If the jury find from all the evidence that W. A. went into possession of the land in dispute under an agreement with his brother, J. M., to make the Rock Mills and High Shoals road the line, and held possession of such lands continuously, claiming to own them, for the ten years or more next before 1889, they must find for the defendant.

(d) If W. A., for the next ten years prior to ——, had been in possession of the land in dispute, intending to claim up to the Rock

27—Dawson v. Falls City Boat Club, 125 Mich. 434, 84 N. W. 618 (620); Shearer v. Middleton, 89 Mich. 632, 50 N. W. 740; Mitchell v. Chambers, 43 Mich. 168, 5 N. W. 57. See also Lempman v. Van Alstyne, 94 Wis. 417, 69 N. W. 171, where adverse possession is defined and the court held the words "visible" and "exclusive" were not necessary where the proof showed that the defendant had gone upon the premises year after year and cut his fire wood.

Mills and High Shoals road, and his possession was open, notorious, uninterrupted, hostile, and under claim of ownership for that time, the jury must find for the defendant.

(e) If the jury find from the evidence that W. A., in —— or ——, abandoned his claim to land in dispute, but that before such abandonment he had acquired title to the land by adverse possession, such abandonment would not defeat his title. They must find a verdict for him unless such abandonment continued for ten years.[28]

§ 448. Admission of Title by Grantor—Boundaries. (a) But if, as is claimed by the plaintiff here, you shall find that the predecessors of these defendants in the claim of alleged title have admitted the title to be in the predecessors, or any of them, and so you find the title established, then it is not necessary that it appear that any possession has been exercised on the part of the owner.

(b) But the point is that the plaintiff contends that in certain deed or deeds in the defendant's chain of title the description of that M. land is given with the boundary on the south, being on the land in dispute.

(c) Now, I think it is my duty to charge you, as a matter of law, that that amounts to an admission on the part of the grantor or grantors so describing that land that the title to the land (being the land here in dispute) is in the party so named in those deed or deeds, as being on the south boundary of the so-called M. land.[29]

§ 449. When Possession of Part Constitutes a Possession of the Whole. (a) The court instructs the jury, that where a party has title, or color of title, to woodland, and uses the land for the purpose of obtaining wood for fuel or fencing, for a farm in the neighborhood, under a claim of ownership, this will constitute a possession; and so, if a person holding a deed for land, enters and clears off, breaks up or improves a part, with intent to follow up such act with other improvements on the land, this will be a possession of the whole.[30]

(b) If you believe, from the evidence, that some time on or about, etc., the defendant went onto a portion of the land in controversy, under his deed, introduced in evidence, and broke up a portion of the land, and that at that time there was no one else in the actual possession of said tract, or any part of it, then such breaking and possession would extend to all the land embraced in his deed.[31]

28—The above series of instructions was approved in Pittman et al. v. Pitman, 124 Ala. 306, 27 So. 242 (244). "These charges," said the court, "given at the request of the defendant asserted correct propositions of law, and were supported by the tendencies of the evidence in the facts hypothesized in each of them. Jones v. Williams, 108 Ala. 282, 19 So. 317; Cobb v. Malone, 92 Ala. 630, 9 So. 738."

29—Merwin v. Morris, 71 Conn. 555, 42 Atl. 855.

30—Wilson v. Williams, 52 Miss. 487; Scott v. Delaney, 87 Ill. 146; Barger v. Hobbs, 67 Ill. 592; Fugate v. Pierce, 49 Mo. 441.

31—Blanchard v. Pratt, 37 Ill.

§ 450. Actual Possession of Portion of Land, Under Deed, Carries with it Constructive Possession of Balance—Two Tracts Conveyed in One Deed—Rule—Limitation. (a) Possession by one of land improved and inclosed holds all within his inclosure. If his possession is under a deed he has, in addition to his actual possession, constructive possession to the extent of the boundaries indicated by his deed.

(b) Gentlemen of the jury, the deed from S. C. H. and L. A. H. to W. E. M. undertakes to convey two tracts of land. If you believe from the evidence that the defendant took actual possession of one of said tracts only, and that his actual possession did not extend to the land in controversy, then you are instructed that limitation in his favor would not begin to run against the plaintiffs, if at all, until he had actual possession of the land in controversy, or some part of the same, and such possession must have been open and notorious.[32]

(c) The court charges the jury that if they find from the evidence that defendant has from the latter part of December, A. D. ——, up to the ————, had adverse possession of any portion of the land sued for, that then he had adverse possession of the whole of it that was not actually occupied and held adversely to him, and that plaintiff would not be entitled to recover any portion of it, unless the jury find from the evidence that plaintiff has acquired a title to some portion of it by adverse possession, and can say from the evidence to what portion plaintiff has acquired title by adverse possession.[33]

§ 451. Possession Under a Parol Contract of Sale is Limited to the Land in Actual Possession—When. (a) If the jury believe from the evidence that the plaintiff, S. L., before the time that M. made his first survey, did not know the description of the lands he claimed in the northwest quarter of the school section, and if the jury further believe from the evidence that the land which S. L. got from

243; Humphries v. Huffman, 33 Ohio St. 395; Lynde v. Williams, 68 Mo. 360.

See also Yocham v. McCurdy, 95 Tex. 336, 67 S. W. 316.

32—Yarborough v. Mayes, — Tex. Civ. App. —, 91 S. W. 624.

"There is no conflict in these charges," said the court. "The latter qualifies the general principle stated in the former and properly applies it to the evidence in the case, and the jury could not have been confused or misled by the two charges."

33—Anniston City Land Co. v. Edmondson, 127 Ala. 445, 30 So. 61 (65).

The court said: "Actual possession of any part of the land under color of title extends to the limits and boundaries as defined in the color of title, with the exception that it may not embrace such as may be adversely held by another. So adverse possession under color of title which involves the element of actual possession. Since without actual possession there can be no adverse possession, the possession is co-extensive with the boundaries defined in the color title, subject to the exception above stated. There was evidence tending to show adverse possession by the defendant under color of title for the statutory period necessary to constitute a bar, and above charge, being referable to this phase of the evidence, was free from error."

his brother J. L. was 100 acres of the mountain land of said quarter section, and that there were 145 acres of such mountain land in said quarter section, then there can be no recovery of any of the uninclosed and uncleared land in said quarter section in this action.

(b) If the jury believe from the evidence that the plaintiff, S. L., when he cut the timber off the lands sued for, if the jury believe from the evidence that he did so cut it off, did it without knowing the boundaries of his land, and without reference to any defined boundaries, then there can be no recovery in this action for the uninclosed and uncleared woodland not included in the three fields numbered 1, 2, and 3 on the map introduced in evidence.[34]

§ 452. **What is Necessary to Constitute Adverse Possession Under an Oral Contract of Real Estate, While in Possession.** If you find from the evidence that the defendant was in possession of part of the property in controversy as a tenant of W. S., and while in such possession purchased the property, then, to constitute possession under such purchase, it is not necessary to actually change the possession; it is sufficient if the defendant at once asserted and claimed ownership and continued to do so. Such acts constitute a holding adverse to the former owner and landlord, the former owner and landlord having knowledge thereof, and the statute of limitations begins to run from the time of such adverse acts.[35]

§ 453. **Possession Presumed to Be Under Legal Title.** (a) The court instructs the jury, that where one person is shown to have the legal title to land, and another person is shown to be in possession of the property, if there is no evidence to the contrary, the law presumes that such possession has been with the consent

34—Tenn. Coal Iron & R. Co. v. Linn, 123 Ala. 112, 26 So. 245 (250), 82 Am. St. Rep. 108.

"A majority of the court were of the opinion that the doctrine announced, extending the adverse possession under a valid parol contract of sale to the boundary of the lands as fixed by the contract, is limited in its application as between vendor and vendee, or in case of execution sale, to the defendant in execution, and the purchaser at such sale; that, when no such relation exists between the parties litigant or their privies, the possession of the adverse holder is limited to his possessio pedis, unless he holds under written color of title. In other words to extend adverse possession beyond the actual possession, the adverse holder must enter upon and hold the lands under a paper writing fixing its boundaries; that color of title cannot exist or be evidenced in any other way, except where the relation exists between the parties litigant above pointed out. Furthermore, they hold, this is the settled rule of law in this state, whatever may be the doctrine in other states, and they must decline to depart from it. They rely upon Hawkins v. Hudson, 45 Ala. 482; Bell v. Denson, 56 Ala. 444; Burke v. Mitchell, 78 Ala. 61; Clements v. Hays, 76 Ala. 280, as supporting their views. The plaintiff in this case was not a trespasser. He had paid the purchase price of the land, and it was of no consequence whether his brother had paid the purchase money to the township trustees for it. If he had not, this could not have affected the plaintiff's rights, if he claimed to own it, as he did, as against them. Beard v. Ryan, 78 Ala. 37; Taylor v. Dugger, 66 Ala. 444."

35—Fox v. Spears, — Ark. —, 93 S. W. 560.

of the owner, and not in hostility to his rights; and if the person in possession sets up a claim to the land by virtue of such possession the burden of proof is on him to show affirmatively, by a preponderance of the evidence, not only that he has been in the open, public, and notorious possession, but it must further appear, from the evidence, that such possession was commenced and continued in hostility to the true owner, and under a claim of right as against him; and these matters must be shown by clear and affirmative proof of such facts as show that such possession was taken and continued in hostility to such owner; they cannot be made out by inference without such proof.[36]

(b) The rule of law is that if a person enters upon land without any title or claim or color of title, the law will adjudge the possession to be in subservience to the legal owner and no length of such possession will render the holding adverse to the title of the true owner. But if a man enters on land without title, claim or color of title and he does not, in fact, go in under the true owner, and such person after acquires what he considers a good title, from that moment his possession becomes adverse.[37]

§ 454. Title by Prescription—Without Color of Title—Paper Title not Necessary. (a) The court instructs the jury, that by the laws of this state, if a person goes into the possession of real estate, under a claim of title, and continues in the open, exclusive, and uninterrupted possession of the premises under such claim of title, for the period of (twenty) years, he will be deemed to be true owner thereof.[38]

(b) If the true and real owner of land permits another to take possession of the land, claiming it as his own, and to continue such possession, openly and publicly, under such claim of title, for a period of (twenty) years or more, such possession will ripen into a right and title in the possessor, and forever after prevent such true owner from taking possession of the property; but in order to have this effect, the commencement of the possession must have been hostile to the rights of the true owner, and must be continued, openly and publicly, for the full period of (twenty) years, under a claim of ownership, during all that time.[39]

(c) It is not essential that a party, who takes possession of lands and holds adversely to the owner, should enter under a deed, or other written title, to cause the limitation of (twenty) years to run in his favor. It is sufficient if the party take possession under claim

36—Buckley v. Taggart, 62 Ind. 236; Jackson v. Thomas, 16 Johnson, 293; Harvey v. Tyler, 2 Wall. 328.

37—Newell on Eject. 753.

38—Walbrun v. Ballen, 68 Mo. 164; Delong v. Mulcher, 47 Ia. 445.

39—Peterson v. McCullough, 50 Ind. 35; Bradley v. West, 60 Mo. 33; Ambrose v. Raley, 58 Ill. 506; Yelverton v. Seel, 40 Mich. 528; McCarde v. Barricklow, 69 Ind. 356.

of ownership, and hold adverse possession, as explained in these instructions, for the period of (twenty) years.[40]

§ 455. **Extent of Possession not Under Color of Title.** (a) The court instructs the jury, that where a person claims possession of real estate without a deed or instrument in writing calling for boundaries, his possession will not extend beyond what he has inclosed or actually occupies.[41]

(b) You are instructed, that when a person has neither the title nor color of title to an inclosed tract of land, the fact that he, during several years, cut fire-wood, and made rails from the timber on it for the use of his farm, does not necessarily show actual possession. Such acts, if isolated and only occasional, may as properly be referred to continuous acts of trespass as indicating possession. To constitute possession, such acts should be exclusive and under claim of title.[42]

(c) Though you may believe, from the evidence, that the defendant went upon the land in question in the spring of, etc., for the purpose of taking possession of the whole tract, and making improvements thereon, claiming the whole tract, still, if the jury further believe, from the evidence, that at that time defendant had no deed, lease or other written evidence of title to the premises, then such possession, in law, is confined to the quantity of ground actually taken possession of by the defendant.[43]

§ 456. **Deed not Necessary to Transfer Possession.** The jury are instructed, that a deed is not necessary to transfer the possession of land held adversely, from one person to another, and when one person succeeds to the possession of another, and it becomes necessary to connect the possession of the two, in order to make the period required by law to bar the owner's rights, the transfer of possession may be shown by parol evidence; in such cases no deed is required.[44]

§ 457. **Possession Under Claim of Title.** (a) The defendants ask the court to charge that the possession of a tract of land under a claim of title by virtue of a written instrument, sole or connected, for forty years before the commencement of this action shall be deemed and is valid against the world. That is another statute of repose. So that, unless the evidence shows you that the plaintiff or his ancestor or grantor was actually in possession of this property, or a part of it, within forty years from the commencement of the action, then his action would be barred.[45]

40—Webber v. Anderson, 73 Ill. 439.

41—Ege v. Medlar, 82 Penn. St. 86; Peterson v. McCullough, 50 Ind. 25; Ill. C. Rd. Co. v. Ind. & Ill. C. Ry. Co., 85 Ill. 211.

42—Austin v. Rust, 73 Ill. 491; Sepulveda v. Sepulveda, 39 Cal. 13; Miller v. L. J. Rd. Co., 71 N. Y. 380; Pullen v. Hopkins, Lea (Tenn.) 741; Williams v. Wallace, 78 N. C. 354.

43—Humphries v. Huffman, 33 Ohio St. 395.

44—Webber v. Anderson, 73 Ill. 439.

45—Sutton v. Clark, 59 S. C. 440, 38 S. E. 150 (155), 82 Am. St. Rep. 848.

(b) The court instructs the jury that unless they should believe from the evidence that the plaintiff, or his vendors under whom he claims, owned and held the land in controversy in actual, adverse possession continuously to a well defined, marked boundary line for fifteen years prior to the alleged trespass, they should find for the defendants.[46]

§ 458. Entering Land under Deed Purporting to Convey Title—Possession for 20 Years—Grant Presumed. (a) If the jury find that the plaintiff entered into possession of the land in dispute, under the paper introduced in evidence as Exhibit A, purporting to be signed by ———— under a claim of ownership, and if they find that he has personally or by his tenants continued in possession thereof for more than 20 years, then the jury must find he is presumed to have attained a grant from the state.[47]

(b) The court instructs the jury that the deeds and papers introduced in evidence by the plaintiff in this case are sufficient to base the legal title to the whole of the land described in the declaration in the plaintiff, and to authorize it to take ———— possession of the whole of that tract of land, unless the defendants have shown an adverse possession to the same or to some part thereof, as explained in this instruction, for a period of twenty years or more before the commencement of this suit, or some valid legal right to the possession of the premises claimed, or some part thereof, by a preponderance of the evidence.[48]

§ 459. Entry of Possession under Deed, Whether Adverse and Whether Land Described in Complaint and Title Offered in Evidence Is the Same, Questions for Jury. The deed from W. L. to L. S., the

46—Vincent, et al. v. Willis, 26 Ky. L. 842, 82 S. W. 583 (584).

The court said: "It is claimed that this instruction is erroneous, because it does not tell the jury that, in order to recover, appellee must have 'claimed', as well as held, the actual adverse possession of the land in controversy for the time therein indicated. It is usual, and, indeed, safer, to use the omitted word in this character of instruction, but we are of opinion that its omission did not, in this instance, vitiate the instruction for the reason that as worded it required the jury, in order to find for the appellee, to believe from the evidence not only that his possession of the land in controversy must have been actual, and 'held' to a well defined marked boundary for the period indicated, but that such possession must have been 'adverse' as well; that is, in 'hostile opposition' (for such is one of the meanings given the word by Webster) to the claim of appellants and all others."

47—Kolb v. Jones, 62 S. C. 193, 40 S. E. 168.

48—C. & A. R. R. Co. v. Keegan, 185 Ill. 70 (73), 56 N. E. 1088.

"We are of the opinion," said the court, "that the refusal of this instruction was erroneous. In Toledo W. & W. Ry. Co. v. Brooks, 81 Ill. 245, we said (p. 247): 'If the court were to instruct the jury that the plaintiff's evidence was better than the defendant's or the converse, we presume all would say that it would amount to an instruction to find in favor of the better evidence, and thus take the whole case from the consideration of the jury. It is not error for the court to thus instruct in case of records, writings or other evidence which is in its nature conclusive or cannot be contradicted.' Plaintiff in error showed title in itself, and was entitled to recover, unless defendants in error proved a possession of the premises for the period of twenty years prior to the commencement of this suit."

defendant herein, purports to convey the entire estate in the lands described in the complaint. It is for the jury to say whether she entered into possession of said land under said deed, and whether the subsequent possession was adverse to and exclusive of the plaintiff's claim. Whether the land described in a particular deed is the same land described in the complaint or some other paper is a question of fact for your consideration, and I cannot tell you whether both papers cover the same land.[49]

§ 460. Ouster—What Required in. (a) I charge you, in conformity with this statute, that, if you find that the defendants had entered upon and held possession of the premises in question at the time M. made his conveyance to the plaintiff, then the deed must be held to be void, and the plaintiff cannot by reason of it establish a title. That is so, gentlemen, with the qualification that by the language of the statute, as you will recollect, the dispossession must be by an ouster; and I say to you that to void the deed from M., the record title owner, the ouster must be of the same character as that required to establish adverse possession.

(b) An ouster must be of the same character. It must be an open, visible, exclusive possession that is to make an adverse possession. It need not continue for fifteen years, but the character of the ouster must be of the same character as in the case of adverse possession of fifteen years, claiming to convey title, or amount to that.[50]

§ 461. Time for Minor to Bring Suit—Admission Against Title. (a) If the plaintiff's father was in possession of the lands at the time of his death, claiming and using them as his own, and plaintiff was at that time an infant, he would have three years after he reached his majority within which to bring his suit, unless at the commencement of the suit the defendant had been in possession of the lands, claiming and using them as his own, for a period of twenty years.

(b) The court charges the jury that if they believe from the evidence that the defendant did, at any time during his possession of the lands sued for, admit that the title of the lands was in the plaintiff, then they may consider that admission in determining the defendant's adverse possession.[51]

49—Suduth v. Sumeral, 61 S. C. 276, 39 S. E. 534, 85 Am. St. Rep. 883.

50—Merwin v. Morris, 71 Conn. 555, 42 Atl. 855.

51—Jones v. Williams, 108 Ala. 282, 19 So. 317.

The court said: "That portion of the oral charge above given to which exception was reserved simply asserts, in substance, what the statute, (Code 1886 § 2624) prescribes as the rule of limitation with reference to bringing suits by a person who was a minor when his right accrued. The objection that the charge was in part abstract, if conceded, would not operate to reverse. We do not declare such charges, when given, to be erroneous, unless it affirmatively appears they worked injury to the complaining party, although it is never an error to refuse such charges."

CHAPTER XXVI.

AGENCY.

See Erroneous Instructions, same chapter head, Vol. III.

§ 462. Definition of General and Special Agent. A person may act for himself or he may act through another. If he act through another, that other is called the "agent," and he is the principal. The power of the agent may be general or it may be special. It is general when the agent is empowered to do a particular thing or many things in a way necessary or proper to accomplish the end. It is special when the agent is empowered to do a particular thing or many things in a limited way. The jury may determine the character of the agency from the testimony. If general the principal is bound, if the

agent exceed his authority and the other party did not know it; if special, the agent must follow his instructions, else the principal will not be bound.[1]

§ 463. What to Consider in Determining Who is the Principal. The court instructs you that on the question of whom W. acted for in the particular transaction, the jury may and should look at all the evidence, and in this connection should consider whom W. got his pay from, and whom he asked to pay him, and the evidence that W. had authority to sell the lot in question if such is the evidence.[2]

§ 464. Implied Powers of Agents. The court instructs the jury that every delegation of authority, or creation of an agency unless the extent of such authority or agency be expressly limited, carries with it the power to do all those things which are necessary, proper, and usual to be done in order to effectuate the purpose of the agency, and embraces all the appropriate means necessary to accomplish the desired end.[3]

§ 465. Third Parties Bound to Take Notice as to Agent's Authority. You are instructed, that it is a rule of law that a person dealing with one known to be an agent, or claiming to be such, is bound, at his peril, to see that the agent has authority to bind his principal in such transaction, or that the agent is acting within the scope of his apparent authority.[4]

§ 466. Agent Bound to Act Solely for His Principal. Where an agent is employed to buy or sell for his principal, or negotiate a trade for him, it is the duty of the agent to act solely in the interest of the principal, and should the agent be or become an interested party, without disclosing the fact to his principal, and sell his own property to his principal, or buy his principal's property himself, or pay himself or cancel his own liability with the funds or property of the principal, the agent would be guilty of constructive fraud; and, if it were shown that the principal was damaged thereby, the agent would be liable to the principal to the extent of same.[5]

1—McGhee et al. v. Wells, 57 S. C. 280, 35 S. E. 529 (531), 76 Am. St. Rep. 567.

2—Williamson v. Tyson, 105 Ala. 644, 17 So. 336.

3—Riverview Land Co. v. Dance, 98 Va. 239, 35 S. E. 720 (721).

"The instruction is in almost the identical words of approved text writers respecting the implied powers of agents. Mechem, Ag. § 311; it correctly stated the law and the court did not err in giving it. It is specially objected to because of the use of the word 'approximate' instead of 'appropriate'. The use of the word 'approximate' instead of 'appropriate' which is the term ordinarily used in this connection, was no doubt inadvertent, but, however this may be, the difference in meaning of the two words did not render the instruction erroneous. Used as it was in conjunction with the words 'necessary,' 'proper' and 'usual', in defining the implied power of an agency, the effect was to restrict, and not to enlarge, its powers, and of this the defendant could not complain."

4—Peabody v. Hord, 46 Ill. 242, 92 Am. Dec. 248.

5—Beatty v. Bulger, 28 Tex. Civ. App. 117, 66 S. W. 893 (896).

§ 467. **Sale by Agent—Duty to Inform Principal of Consideration.** But after such letter was written, submitting an offer for the lot, if you find that the defendants were the agents of plaintiff in the transaction, they received an offer of a greater sum, then they in good faith were bound to inform plaintiff of such fact. On the other hand, if they were not his agents, then they were under no such obligation.[6]

§ 468. **Secret Profits of Agent Belong to Principal.** The court instructs the jury, as a matter of law, that if an agent makes any profit, in the course of his agency, by any concealed management, in either buying or selling, or other transaction, on account of the principal, the profits will belong exclusively to the principal.[7]

§ 469. **Principal May Rely Upon Representations of Agent.** If you find from the evidence that the defendant H. was acting for the plaintiff in making the loan for her, you are instructed that she was justified in relying upon his representations as to the character of the security he was to obtain for her, and in accepting the security furnished by him as in everything corresponding to her instructions. You are further instructed that she was not required to examine the records to discover whether or not the mortgage obtained for her was a first mortgage, or to take any action until she had reason to believe from knowledge or information coming to her, that her instructions had been violated.[8]

§ 470. **Principal Bound by Acts of Agent.** The court instructs the jury as a matter of law, that before a principal can be bound by the acts of his agent, it must be shown by the party asserting such agency that the principal authorized such agent to act for and in his behalf, and that such agent carried out the business of his principal and within the scope of his authority as such agent; and if the plaintiff in this case expects to recover, he must show by a preponderance of the evidence that he was acting as such agent under the direction and authority of the defendant, otherwise he cannot recover.[9]

§ 471. **When Bound by Agent's Warranty as to Goods Sold—Implied Contract.** (a) The court further instructs the jury, that while it is true that the principal is not bound by the unauthorized acts of his agent, when such acts are beyond the scope of the agent's apparent authority, yet the principal is bound by a warranty, made by an agent, of the quality of an article sold by the agent, when the

6—Hillebrant v. Green, 93 Iowa 661, 62 N. W. 32 (34).

7—Cotton v. Holliday, 59 Ill. 176; Love et al. v. Hoss, 62 Ind. 255.

8—Faust v. Hosford, 119 Ia. 97, 93 N. W. 58 (60).

9—This was approved in Hafner v. Herron, 165 Ill. 242 (249-251), affirming 60 Ill. App. 592 (594), 46 N. E. 211. In this case, upon appeal, it was urged that the plaintiff, a broker by bad faith to his principal had forfeited his commissions on the sale of stock. Held that this instruction submitted no such theory to the jury and that that defense could not be raised for the first time upon appeal.

buyer is justified, from the nature of the business and the manner of doing it, in believing that the authority to make the warranty had been given, and the buyer had no means of knowing the limitation of the agent's authority.[10]

(b) The court instructs the jury, that if they believe from the evidence that defendant sold the mattresses in controversy as agents for ———— or ————, and not as their own property, and disclosed their agency and the name of the vendor prior to and in the making of such sale, then the plaintiff cannot recover. The court instructs you that you cannot find for plaintiff unless you believe from a preponderance of the evidence that the defendants made an express contract to warrant the condition of the mattresses sold to plaintiff. No recovery in this case is sought on an implied contract, and even though you may believe from the evidence that the mattresses were unfit for the purposes for which they were ordered, this will not authorize you to find a verdict for the plaintiff unless you further find from the evidence that the defendants agreed with plaintiff that such mattresses were to be fit for such purpose, or unless they authorized some one in their name to make such contract for them.[11]

§ 472. **Principal Consents to Usages of Agent's Market.** The jury are instructed that a person dealing at a particular market will be taken to have dealt according to the custom and usage of that market, and if he employs another to act for him in carrying on business dealings on such market, he will be held as understanding that the business should be conducted according to the general usage and custom of said market; and this is the rule whether he in fact knows of the custom or not.[12]

§ 473. **Estoppel by Holding Out as Agent.** (a) The court instructs the jury that if a corporation knowingly and voluntarily permits a person to hold himself out to the world as its agent, said corporation will be bound as principal to those dealing with such person to act upon the faith that such agency exists, and this is true irrespective of whether or not an agency in fact exists.[13]

(b) You are instructed, that if a person knowingly and voluntarily permit another to hold himself out to the world as his agent, he will be held to adopt his acts, and be bound, as principal, to the person who gives credit to the one acting as such agent.[14]

10—1 Parsons on Cont. 52; Murray v. Brooks, 41 Ia. 45.

11—Haines v. Neece, — Mo. —, 92 S. W. 922.

12—Stock Yds. Co. v. Mallory S. & Z. Co., 157 Ill. 554 (567), reve's'g 54 Ill. App. 170, 41 N. E. 888, 48 Am. St. Rep. 341. "The instruction asked for defendant below should have been given. It conforms exactly to the ruling made by this court in Samuels v. Oliver, 130 Ill. 73, 22 N. E. 499. The usages of the particular trade or business are properly admissible for the purpose of interpreting the powers given to an agent. Phillips v. Moir, 69 Ill. 155; National Furnace Co. v. Keyston Manufacturing Co., 110 Ill. 427."

13—Italian-Swiss Agri. Colony v. Pease, 194 Ill. 98 (105), aff'g 96 Ill. App. 45, 62 N. E. 317.

14—Thurber v. Anderson, 88 Ill. 167.

§ 474. **Agency Presumed to Continue, When.** The jury are instructed, that it is a rule of law, that when a person is shown to have been an agent of another in a particular business, and continues to act as such agent, within the scope of his former authority, it will be presumed that his authority continues, and his acts will bind his principal, unless the person with whom he deals has notice that his agency has ceased, or until after the lapse of such a length of time as ought to put a reasonably prudent man on inquiry as to the continuance of such agency.[15]

§ 475. **Notice to Agent.** (a) The jury are instructed, that it is a rule of law that notice to an agent is notice to his principal, and that what is known to an agent is known to his principal; provided, such notice or knowledge is received by the agent while he is acting as such agent.[16]

(b) Notice to an agent, in order to bind the principal, must be brought home to the agent, while engaged in the business or negotiation of the principal to which the notice relates; and when it would be breach of trust in the former not to communicate the knowledge to the latter.

(c) While it is a general rule of law, that a notice to an agent is notice to his principal, still in order to bind a person by notice to his agent, it must appear, from the preponderance of the evidence, that the alleged agent was the agent of the party sought to be charged in relation to the very matter to which the notice relates, and that the notice or information came to the knowledge of the agent while he was acting as such agent.[17]

§ 476. **Notice to Agent Usually Notice to Principal.** The jury are instructed, that notice to an agent of any fact concerning the matters of his agency, is the same as notice to the principal. The law presumes that an agent transmits, or in some manner, communicates, to his principal all information received by him relating to the matter of his agency.[18]

§ 477. **Notice to Agent of Two Principals Not Notice to Each—When Binding on Agent.** (a) The jury are instructed that a party is not chargeable with notice of facts within the knowledge of his agent or attorney, where the agent or attorney acquires such knowledge while acting as the agent or attorney of another person.[19]

15—Barkley v. Renssalaer etc. Co., 71 N. Y. 205; Packer v. Hinkley, etc., 122 Mass, 484; Murphy v. Ottenheimer, 84 Ill. 39; Howe, etc. v. Linder, 59 Ind. 307; Summerville v. Han. & St. Joe Rd. Co., 62 Mo. 391.

16—Wade on Notice, § 672; Astor v. Wells, 4 Wheat. 466.

17—Wade on Notice, § 689.

18—Saulsbury v. Wimberly, 60 Ga. 78; Roach v. Carr, 18 Kan. 329; Taggs v. Tenn. M. Bk. 9 Heisk. 479. This rule is subject to exceptions noted elsewhere, see Secs. 475, 477.

19—Harrington v. McCulloum, 73 Ill. 476; Altman & T. Co. v. Webber, 4 Ill. App. 427.

(b) The court instructs the jury, that any knowledge that a person has when he is performing an act as agent to another is binding upon the person even though the party was at the time acting for the other party to the transaction.[19a]

§ 478. Notice to Chairman Not Notice to Board—Not Bound by Acts of Individual Members. (a) When the officers or agents of a public corporation have no power with respect to a given matter, neither their acts nor their individual knowledge in respect to the matter can, in any way, bind or affect such corporation.[20]

(b) The supervisors have no power to act individually; it is only when convened and acting together as a board of supervisors that they represent and bind the county by their acts; and the chairman of the board has no greater authority, in his individual capacity, than any other member.[21]

(c) Individual members of a corporation cannot, unless authorized, bind the body by express promises; hence it follows that a corporate engagement cannot be implied from their unsanctioned conduct or their declarations.[22]

§ 479. Public Officer as Agent. (a) The jury are instructed, that it is a general rule that if a special agent, whose authority is conferred by statute or by orders of court, or one acting in the capacity of a public officer, acts outside of the authority conferred, the principal will not be bound by his acts.[23]

(b) The jury are instructed, that the members of the county court can only bind their county, in matters of claims, when acting as a court, and their records are the only admissible evidence of their judicial acts.[24]

§ 480. Ratification by Principal of Unauthorized Agent's Acts. (a) As you have been told in the previous instruction, the plaintiff would not be bound by the act of an unauthorized agent unless it ratified or affirmed said action; and if you find from the evidence that the contract made by the said E., if such you find the fact to be, was without authority, but that the plaintiff ratified and affirmed the same, then the said contract would be binding upon the plaintiff. And in determining whether or not the plaintiff did ratify said alleged contract to take back the binders in controversy, if you shall find said contract to have been made, you have a right to consider the correspondence between the parties, the delivery of the machinery if any, the acceptance by the plaintiff of compensation for the same, the entire course of business between the parties, and all the facts and circumstances surrounding the transaction tending to

19a—Tufts v. Johnson, 46 Ill. App. 191 (192).
20—Johnson v. S. Dist., 67 Mo. 319.
21—Johnson v. S. Dist., supra.
22—Benton v. Brd. of Sups., 84 Ill. 384; Harrison v. Liston Dist., 47 Ia. 11.
23—Dart v. Hercules, 57 Ill. 446.
24—McLaney v. Co. of Marion, 77 Ill. 488.

throw light upon the question as to said alleged ratification. If, however, you find from the evidence that the agent E. had no authority to make the said contract, and plaintiff had no knowledge of the same, and the circumstances were not such as to impart knowledge to the plaintiff of the making of the same, then there would be no ratification upon the part of the plaintiff company.[25]

(b) The law is, that where a person's name is signed to a promissory note without his authority, he may afterwards ratify its execution and acknowledge its binding validity upon him, and if he does this his relation to the note will be precisely the same as if he executed it personally.[26]

(c) You are instructed, that although you may believe, from the evidence, that the said A. B. was not authorized to make a bargain with the plaintiff for the defendant, in relation to, etc., yet if you believe, from the evidence, that the said A. B. did make the contract for the defendant, as alleged and claimed by the plaintiff, and that the defendant, with full knowledge of what had been done, ratified the bargain so made, then the contract will be as binding upon the defendant as if he had authorized the said A. B. to make the bargain in the first instance.[27]

§ 481. Ratification of Former Acts May Prove Agency in Similar Acts. It is the law that any act of an assumed agent, and a recognition of his authority by the alleged principal, may, in a proper case, prove the agency to do other similar acts.[28]

§ 482. Ratification by Accepting Benefits of Agent's Contract. You are instructed, that a principal who, with the full knowledge of all the material facts affecting his rights, receives the benefit of an unauthorized agreement, made for him by one purporting to be his agent, is precluded thereby from questioning the agent's authority in the transaction.[29]

§ 483. Ratification by Suit—Election. If defendants, with full knowledge of the circumstances attending the giving of the due bill in question, brought a suit on it in Georgia, then defendants cannot set off the value of the cotton in question in this case.[30]

25—Osborne & Co. v. Ringland & Co., 122 Iowa 329, 98 N. W. 116, 118; Williamson v. Tyson, 105 Ala. 644, 17 So. 336 (339).

26—Paul v. Berry, 78 Ill. 158; Eadie v. Ashbaugh, 44 Ia. 519.

27—City of Detroit v. Jackson, 1 Doug. (Mich.), 106; Hall v. Chicago, etc., R. Co., 48 Wis. 317; Stewart v. Maher, 32 Wis. 344; Drakely v. Gregg, 8 Wall. (U. S.), 242.

28—State v. Ames, 90 Minn. 183, 96 N. W. 330 (334).

29—Pike v. Douglass, 28 Ark. 59.

30—Lytle et al. v. Bank of Dothan, 121 Ala. 215, 26 So. 6 (10).

"As to the cotton mentioned in the claim of set-off, the defendants could not treat it as having been sold by them to Drewry, and also as remaining their property. It appears that in 1893, Drewry was sued in Georgia by defendants for the price of the cotton as evidenced by his due bill given therefor when payment of his check was refused, and judgment was obtained against him in that suit. Even if they had not previously

§ 484. Ratification by Failing to Repudiate Agent's Unauthorized Acts. You are further instructed, that a principal, when fully informed of his agent's acts, must dissent from them in a reasonable time, or he will be held to have ratified them. And in this case, if you believe, from the evidence, that defendant received full information of the acts of the said A. B. in the premises, on or before, etc., and remained silent and inactive until, etc., then that was not a reasonable time in which to dissent from the acts of the said A. B.[31]

§ 485. Ratification of Assumed Agent's Contract Must Be Entire. The jury are instructed, as a matter of law, that if a person adopts a contract made on his behalf by an agent, who had no authority to make it, he must adopt it in its entirety; he cannot adopt it in part and repudiate it in part.[32]

§ 486. Ratification—Knowledge of Agent's Acts Essential. (a) The jury are instructed, that before a person can be bound by the ratification of an act, done on his behalf by one professing to act as his agent, it must appear, by a preponderance of the evidence, that he was fully informed of all the material facts affecting his rights in the transaction, and unless it does so appear, he will not be bound by an unauthorized act, upon the ground of ratification alone.[33]

(b) The court instructs the jury that, when the act of ratifying the act of the agent is claimed to be implied, from a knowledge of the facts, by the principal, it must appear, by a preponderance of the evidence, that the principal had full knowledge of all the facts affecting his interests in the transaction.[34]

(c) The court instructs the jury, that it is a rule of law, that where an alleged principal does anything towards ratifying an act done in his behalf by an unauthorized person, and the acts of ratification are done in ignorance of, or under a mistake of, any of the

elected to treat the transaction as a sale, the institution and prosecution of that suit to judgment if done with knowledge of the facts attending the giving of the due bill, amounted to a conclusive election on the part of defendants to treat Drewry as a purchaser, and to abandon their claim of ownership in the cotton, citing Butler v. Hildreth, 5 Metc. (Mass.) 49; Insurance Co. v. Cochran, 27 Ala. 228; Nield v. Burton, 49 Mich. 53, 12 N. W. 906; Terry v. Munger, 121 N. Y. 161, 24 N. E. 272, 18 Am. St. Rep. 803, 8 L. R. A. 216. There was therefore no error in giving this charge."

31—Meyer v. Morgan, 51 Miss. 21, 24 Am. Rep. 617; Hawkins v. Lange, 22 Minn. 557; Breed v. Cent City Bk., 4 Col. 481; U. S. R. S. Co. v. Rd. Co., 37 Ohio St. 450; Waterson v. Rogers, 21 Kan. 529; Heyn v. O'Hagan, 60 Mich. 150, 1 Am. St. Rep. 491.

32—Southern Exp. Co. v. Palmer, 48 Ga. 85; Widner v. Lane, 14 Mich. 124, 90 Am. Dec. 230; Henderson v. Cummings, 44 Ill. 325; Kreder v. Trustees, etc., 31 Ia. 547; Menkins v. Watson, 27 Mo. 163; Saveland v. Green, 40 Wis. 431; Tasker v. Kenton Ins. Co., 59 N. H. 438, 47 Am. Rep. 217; Strasser v. Conklin, 54 Wis. 102.

33—Kerr v. Sharp, 83 Ill 199; Bannon v. Warfield, 42 Md. 22; Roberts v. Rumley, 58 Ia. 301, 12 N. W. 323; Aetna Ins. Co. v. N. W. I. Co., 21 Wis. 458, 94 Am. Dec. 555; Proctor v. Tows, 115 Ill. 138, 3 N. E. 569.

34—Farwell v. Meyer, 35 Ill. 40; Jemison v. Parker, 7 Mich. 355; Connett v. Chicago, 114 Ill. 233, 29 N. E. 280; Schollay v. Moffett-West Drug Co., 17 Colo. App. 126, 67 Pac. 182.

material facts affecting the interests of the principal, then the act of ratification will not be binding on the principal.[35]

§ 487. **Principal's Diligence—How Determined.** In determining whether the plaintiff was or was not negligent (that is, did not exercise due diligence to discover the existence of a prior mortgage) you should consider the relations existing between the parties,—whether the defendant made any statements or representations to plaintiff as to the mortgage being a first mortgage while he was acting as her agent—and together with all the other facts and circumstances before you say whether she was or was not diligent in discovering the existence of the first mortgage on the premises in question at the time she did discover it.[36]

§ 488. **When Principal is Liable for Agent's Torts.** The jury are instructed, that if a tort or wrong is committed by an agent, in the course of his employment while pursuing the business of his principal, and it is not a willful departure from such employment and business, the principal will be liable for the act, although it is done without his knowledge.[37]

§ 489. **Undisclosed Principal Bound by Acts of Agent.** If W. acted for some one else, whether the some one else knew it or not, and the some one else accepted the fruits of the transaction, then such person is bound by the acts of the person acting as agent.[38]

§ 490. **When Agent of Undisclosed Principal Liable for Goods Bought by Sub-Agent.** (a) In arriving at a determination as to whether or not the plaintiffs would have a right to extend this credit, and were authorized by the defendant D. A. to extend such credit, you are to take into consideration the acts and declarations and statements of the defendant D. A. made at or about the time this credit was extended to him; and I instruct you, that, if you find, as a matter of fact, that the defendant D. A., together with Mr. B., went to the plaintiffs on or about ——— and obtained an estimate upon a bill of lumber, and that the defendant D. A. authorized Mr. B. to order the lumber at such time as he might want it, and if you further find as a fact that the defendant D. A. did not state that the lumber was to be charged to the Traction Company, and if you find as a fact that the defendant D. A. did not say anything to the plaintiffs about whom they should charge the lumber to, they would have the right as a matter of law to charge it to the defendant D. A.

35—Miller v. Board of, etc, 44 Cal. 166.

36—Faust v. Hosford, 119 Iowa 97, 93 N. W. 58 (60).

37—Noble v. Cunningham, 74 Ill. 51; Cooley on Torts, 533; Hamilton v. Third Ave. Rd. Co., 53 N. Y. 25.

38—Williamson v. Tyson, 105 Ala. 644, 17 So. 336 (339). The court said:

"The charge given by the court may be somewhat indefinite in its terms, but the principle of law asserted is in accordance with our views of the law." See also Osborne & Co. v. Ringland & Co., 122 Iowa 329, 98 N. W. 116 (118).

(b) I further instruct you that whether or not the defendant D. A. was acting in his capacity as vice president of the Traction Company in ordering the said lumber, and whether or not he was acting as its agent in the purchase of said lumber, that the plaintiffs would not be bound by such fact unless the defendant D. A. did something to bring the fact of such alleged agency to the attention of the plaintiffs at or before the time that the credit was extended to the defendant D. A., and the lumber was delivered to him, which delivery was made at the time that the lumber was loaded upon the cars at the station in Battle Creek. An agent who orders goods without legal authority for his principal binds himself, and, if an agent orders goods for a principal without disclosing the name of the principal to the party from whom he orders the goods, such party may charge the goods to the agent, and sue and collect from him; and I instruct you that whatever may have been understood by the defendant D. A., as between himself and the officers of the Traction Company, it would be wholly immaterial, unless the same was communicated to the plaintiffs, and the plaintiffs were instructed by the defendant D. A., or the defendant D. A.'s actions, conduct or statements were such that the plaintiffs might have inferred from such actions, conduct and statements made at or before the credit was extended and the lumber was delivered, that such credit was not to be given to D. A. himself, but was to be given to the Traction Company.

(c) The burden of proof is upon the plaintiffs, and if you find from all the evidence in the case that some person ordered this lumber for the defendant D. A. the burden is upon the plaintiffs to show by fair preponderance of evidence that such order was given by an agent of the defendant D. A. having the authority to bind him.[39]

§ 491. Defendant Refusing to Accept Goods as Plaintiff's, But Accepts as Agent's. If you believe from the evidence that, notwithstanding O. may have, for plaintiff, notified defendant, or his agents, that he was delivering the piling in controversy for plaintiff, still, if defendant refused to accept said piling as plaintiff's, but accepted same as O.'s, and so notified O., and you believe from the evidence that O. was acting as the agent of plaintiff, and if, after said notice, O., for plaintiff, continued to furnish said piling for plaintiff, the plaintiff cannot recover.[40]

§ 492. False Representations by Real Estate Agent. (a) That if W. in dealing with T. in reference to the sale of plaintiff's lot, acted as plaintiff's agent, whether employed so to act or not, or known to have so acted or not, then the plaintiff is bound by all

39—In Rathbun v. Allen, 135 Mich. 699, 98 N. W. 735 (736), the court after telling the jury that the only question was whether or not the defendant, D. A., vice president of the traction company, had authorized plaintiff to furnish lumber on his personal credit and whether plaintiffs had so furnished it, instructed as above.

40—Central C. & C. Co. v. Good, 4 Ind. T. 74, 64 S. W. 677 (680).

acts of W. in affecting the sale; and if the defendant was induced to make the contract by a false representation made by W. as to the solvency of McB., on which T. relied, in contemplation of law it is the same as if plaintiff had made such representations personally, since the plaintiff claims the benefit of the transaction.

(b) It makes no difference that the owner did not employ W. as agent, or that he did not know of his false representations. If he did in fact act in dealing with T. as such agent and did in fact make false representations to induce T. to buy the lot, on which T. relied and acted, and the plaintiff, after it is known, claims and holds the benefit of the fraud perpetrated by W. this is a ratification and approval of the agency.[41]

§ 493. **Investment of Funds for Another—General Authority Insufficient to Invest More Than Amount Deposited.** (a) If you believe from the evidence that plaintiff left with defendants $—— to be used in the purchase of B. stock, and the defendants purchased for the plaintiff 50 shares of B. stock at the price of $—— per share, aggregating $——, and in paying therefor used plaintiff's $——, together with $—— of defendants' and charged the plaintiff with the entire amount expended in said purchase, to-wit, $——, and refused or failed on demand to deliver to plaintiff shares of said stock purchased of the value of said $——, then the plaintiff is entitled to recover, unless you further believe from the evidence of the prior dealing between the parties, and the agreement between the parties as to the purchase of shares of B. L. & I. Company when the said sum of $—— was left by the plaintiff in defendants' hands, and from the other circumstances of the case that the defendants were authorized to purchase more stock than $—— would pay for.

(b) No mere general authority to invest the money in defendants' hands in B. stock would authorize defendants to buy and charge plaintiff with $—— stock.[42]

§ 494. **Knowledge of Agent Perpetrating Fraud on Principal Not Imputed to Principal.** (a) I charge you that, if S. [president of defendant bank] at the time he drew the money in question had the intent to misappropriate and convert it to his own use, he was engaged in perpetrating an independent fraud on his own account, and the knowledge of his own intent could not be imputable or imputed to the bank, and would not be notice, constructive or otherwise, to it, merely because he was its president.

(b) That while the knowledge of an agent is ordinarily imputed and charged to his principal, there is an exception to this rule in cases of such conduct on the agent's part as to raise a clear presumption that he would not communicate the fact in controversy; as when the agent acting nominally as such in reality acting in his

41—Williamson v. Tyson, 105 Ala. 644, 17 So. 336 (338).

42—Bradfield et al. v. Patterson, 106 Ala. 397, 17 So. 536.

own or another's interest and adversely to that of his principal, or when the communication of such fact would ordinarily prevent a consummation of a fraudulent scheme, which the agent was engaged in perpetrating.

(c) That the question of notice to the bank of the intention of S. to misappropriate the money drawn out by him is a conclusion to be arrived at by the jury from all the circumstances detailed in the testimony. That they are not limited alone to the knowledge of S., obtained by him as executor, but the jury are to consider the testimony as a whole, the knowledge of the officers of the bank, circumstances occurring within their knowledge; and if they find from all the circumstances of the case, that the officers knew, or had such grounds as would have been sufficient to a reasonable man for knowing, that S. intended to use this fund so drawn by him for his own purposes, then that is sufficient to give notice to the bank of such knowledge. Provided, that the testimony satisfies you as a jury that S. was acting officially for the bank in the transaction, and not acting as a depositor drawing on his deposit.

(d) The court instructs you that in drawing the money in question out of the bank, S. was acting adversely to the bank, and not in its behalf; and if, when drawing it, he intended to misappropriate and convert it to his own use, notice of such intent would not be imputed to the bank merely by reason of the fact that he was president of the bank at the time.

(e) That, if S. was president of the bank when he drew the money in question out of the bank, and at the time had the intent to misappropriate and convert the money to his own use, the mere fact of his being such president would not be notice, constructive, or otherwise, to the bank.

(f) That, knowledge of an agent of a corporation or other principal while engaged in a fraud for his own benefit cannot be imputed to such corporation or other principal. Unless, also, the corporation or the principal is benefited by the fraud, in which case the corporation or other principal would be liable to the extent of its benefit received from the fraud.

(g) If the jury believe that S. was president of defendant bank, and that he knew that the deposit in said bank standing in the name of S. and W. K., Sr., belonged to the *cestui que trust* under the will of W. K., Sr., then when the said deposit was entered in the said bank, and became subject to his general supervision as president of the bank, whenever the bank acted through him, or with his knowledge, in any transaction concerning the deposit, where that knowledge was material and applicable, such knowledge of S. concerning the deposit is the knowledge of the bank. That is the law which would govern a transaction with regard to the deposit in which he (S.) may have acted as officer of the bank and as its agent, but not if he acted concerning the deposit as any other depositor may

have done. So, gentlemen, you will decide from the testimony in this case whether S. was acting as an officer and agent of the bank in drawing out said deposit or was acting as a depositor, such deposit being subject to his checks as such depositor. And here I charge you that if S. and his co-executor originally placed the money on deposit in the defendant bank, and if he was, at the time he drew the money out, acting as sole surviving executor, and authorized to act as such, then the bank was reasonably bound to pay the check of S. to the extent of the deposit, and for any loss which the *cestui que trust* may have suffered by the misappropriation of the money by S. the bank will not be liable in law, unless the bank as a bank was guilty of a breach of trust towards this *cestui que trust* under the will of W. K., or acted in collusion with S. in a fraudulent plan and purpose to misappropriate the money on deposit; and that depends, of course, entirely upon the testimony, and it is for you to decide.

(h) If the jury believe that S. was president of defendant bank at the time mentioned in the complaint, and that he drew from said bank, at the periods therein stated, the said amounts alleged to be and which were the property of the *cestui que trust,* and at the time said deposits were so drawn he, the president of the bank, was in the bank, acting as its president, with the general supervision of its affairs, including this deposit, knowing that the transaction was concerning said deposit, and then intended to misappropriate said amounts so drawn, and did in fact misappropriate them, then his knowledge of the same as a matter of law became the knowledge of the bank, and his receipt as executor cannot discharge the bank if such receipt formed a part of the fraud. This is the law in this case, if the testimony satisfies you that S., in drawing the deposit, was acting as president, or officer or agent of the bank, representing the bank, and acting for it, and not acting as depositor or as executor with a right to draw on the deposit. The knowledge of S. as an executor is not to be imputed to the bank simply because he was president. It can be imputed to the bank and will bind the bank only with regard to transactions in which he acted as president or agent of the bank, acting in the business of the bank, and in its behalf. To illustrate: Should the president of a bank, who was also executor of an estate, have on deposit in the bank a fund of money as executor, and should transfer that deposit from his account as executor to his own individual account, which he and the bank knew to be overdrawn, and should loss ensue to his *cestui que trust,* in such case the bank would be liable to the extent of the loss, because such a transaction would be acting, in part at least, as officer of the bank and in the business of the bank, and his knowledge would be chargeable to the bank, which would be held responsible to the extent to which it was benefited by the transaction, under the equitable doctrine that a principal cannot be

allowed to reap the reward of the dishonesty of its agent. The law will not allow the principal to enjoy the fruit of its agent's fraud. If the principal shares in its agent's reward, it must also carry the burden of the agent's guilty knowledge.[43]

43—The eight instructions given above were approved by the court in the case of Knobeloch v. Germania Sav. Bank, 50 S. C. 259, 27 S. E. 962 (965). See also Schollay v. Moffett-West Drug Co., 17 Colo. App. 126, 67 Pac. 182; Schutz v. Jordon, 141 U. S. 213, 11 Sup. Ct. 906, 35 L. Ed. 705.

See "Brokers," chapter XXXVII.

CHAPTER XXVII.

ALIENATION OF AFFECTION—CRIMINAL CONVERSATION—SEDUCTION.

See Erroneous Instructions, same chapter head, Vol. III.

§ 495. Alienation of Affection of Husband. The great question for you to decide is, did Mrs. H., knowing that Mr. K. was a married man, wrongfully alienate or entice away the affection of Mr. K. from his wife, and did she wrongfully and knowingly deprive Mrs. K. of the comfort, society, support, love and affection of her husband, and was this done by Mrs. H. either in the state of North Dakota or Minnesota.[1]

§ 496. Alienation of Wife's Affections—Proximate Cause. If you find from a preponderance of the evidence that the conduct of the defendants together, or either of them alone, was the controlling cause which induced the plaintiff's wife to leave him, and that without such conduct his said wife would not have left him, then he would be entitled to recover from that one of the defendants whose conduct furnished such cause, or from both defendants if each of them contributed to such controlling cause, although there might have been other causes contributing to the same results.[2]

§ 497. Defendant's Acts Must Be Controlling Cause. The jury are instructed, that if the conduct of the defendant was the controlling cause which induced the husband to leave his wife, the plaintiff, and if the jury are satisfied that but for the conduct of the defendant he would not have left the plaintiff, plaintiff is entitled to recover, although there might have been other causes contributing to the same result.[3]

1—King v. Hanson, 13 N. D. 85, 99 N. W. 1085.

2—Figg et al. v. Donahue, 4 Neb. 661, 95 N. W. 1020.

3—Rath v. Rath, — Neb. —, 89 N. W. 612. The court said. "This instruction plainly told the jury that the conduct of the defendant must have been the controlling cause, and that if, without such conduct, plaintiff's husband would not have left her, then she would be entitled to recover."

CRIMINAL CONVERSATION.

§ 498. **What Must Be Proved to Sustain the Action—Character Evidence.** (a) The plaintiff's declaration charges the alienation of his wife's affections by means of adultery having been committed with her by the defendant. Now, before the plaintiff can recover under this count, he must satisfy you that the defendant committed adultery with the plaintiff's wife substantially at the time and place and under the circumstances alleged by the plaintiff in his declaration.

(b) In order to establish the charge of adultery, the plaintiff must first prove an adulterous disposition on the part of the defendant toward Mrs. K.; second, an adulterous disposition on her part toward the defendant; and, third, the opportunity for the gratification of this adulterous disposition. If any one of these elements is lacking, the plaintiff must fail. Mere opportunity is not sufficient; neither is the adulterous disposition without the opportunity sufficient; neither would it be sufficient to prove an adulterous disposition on the part of the defendant, coupled with the opportunity, unless the plaintiff goes farther, and proves an adulterous disposition on the part of the plaintiff's wife.

(c) The defendant has offered evidence of his good character. This was permitted because the declaration charges him with commission of a crime, that, is, intending to commit the crime of adultery. You are instructed that good character, if established, is of importance to a person charged with crime. It is not usual, perhaps, for good men to commit crime, but it is possible, and men who stood high have been guilty. You should consider whether a person with a good character would be less liable to commit a crime than one with a bad character. You will consider this evidence with all the rest, and give the defendant all the benefit of it that you believe him entitled to.[4]

§ 499. **Husband's Forgiveness no Defense.** (a) The jury are instructed that, where a defendant has debauched the wife of a plaintiff, the right of action of the latter is complete; and the mere fact that such plaintiff forgives his wife and continues the marital rela-

4—The three instructions given above were approved in Knickerbocker v. Worthing, 138 Mich. 224, 101 N. W. 540 (543). Regarding the first instruction the court said: "I think it a proper statement of the law, and it, or its equivalent should have been given. See Dunn v. Dunn, 11 Mich. 284; Green v. Green, 26 Mich. 437; Freeman v. Freeman, 31 Wis. 235." Regarding the second charge: "What I have said as to the former request will apply with equal force to this. See 8 Am. & Eng. Ency. of Law (2d Ed.) 269; Bishop on Divorce, § 619; Freeman v. Freeman." Supra. In reference to the third instruction the court said: "This question was passed upon in Adams v. Elseffer, 132 Mich. 100, 92 N. W. 772, under which decision the charge of the circuit judge was even more favorable to the defendant than it ought to have been."

tion does not necessarily have the effect to establish his connivance or assent to the misconduct of such defendant.

(b) If the jury believe from the evidence that defendant committed the offense charged in the petition herein, and that plaintiff has forgiven his wife and is living with her, through the exercise of Christian virtue, the influence of family interest, or even in the want of what may be regarded as a true manly spirit, that fact could not destroy his right of action for the injury done him by this defendant.[5]

§ 500. **Damages May Be Lessened if Offense is Condoned.** The fact that the husband, after learning of the wrong that he had suffered, did not break up his home or drive his wife therefrom or apply for a divorce, but condoned her offense, is no bar to his action against the defendant for any wrong committed by him. It may lessen the damages, but it does not take away the right of action, and the damages, if any, are for you to find; if you reach that branch of the case.[6]

§ 501. **Consent of Husband is a Good Defense.** (a) If you believe from the evidence that the plaintiff was willing, or contributed

5—Smith v. Meyers, 52 Neb. 70, 71 N. W. 1006.

"The cohabitation of plaintiff with his wife after knowledge of her intimacy with the defendant did not bar the right of action, nor did such fact necessarily prove collusion between plaintiff and his wife, citing Verholf v. Van Houwenlengen, 21 Iowa 429; Stumm v. Hummel, 39 Iowa 478; Sanborn v. Nelson, 4 N. H. 501; Sikes v. Tippings, 85 Ga. 231, 11 S. E. 662."

6—Smith v. Hockenberry, — Mich. ——, 109 N. W. 23.

The court said: "You will see that the question is thus presented whether the condonation of the wife's offense by the husband may be considered in mitigation of damages. Plaintiff's counsel cite, in support of the claim that such testimony is not to be received in mitigation, Heermance v. James, 47 Barb. (N. Y.) 120, which was a case in no wise like the present. The question in that case was whether the act of defendant, in influencing the plaintiff's wife to refuse to recognize or receive the plaintiff as her husband or to live with him as his wife, was actionable. The holding of the court was that an action would lie for this wrong, even though the wife continued to live in the house with her husband. It was with reference to this situation that the language used in the brief of counsel was employed, viz.: 'Her remaining with him under the circumstances would rather add the provocation of insult to the keenness of suffering. It would continue before him a present, living, irritating, aggravating, if not consuming source of grief, which even her absence in a measure might relieve.' It is obvious at a glance that the court was not there dealing with the question here involved. The authorities bearing directly on this question are not numerous. Some English cases are said to hold condonation a bar. 3 Enc. p. 795. The current of authority is not so. On principle, however, we hold that the fact that the plaintiff has continued to live and cohabit with the wife is a circumstance to be considered in mitigation. The declaration in such case usually as in the present, contains a charge of loss of the society, fellowship and assistance of the wife. Why should it not be competent to show that this was not the case for any considerable time? See Morning v. Long, 109 Iowa 288, 80 N. W. 390; Ball v. Marquis, — Iowa —, 92 N. W. 691. We think the instructions of the court fair in all respects."

in any degree, to have his wife throw herself in the way of the defendant, and to try to entrap him into having connection with her, the plaintiff cannot recover.

(b) If you believe from the evidence plaintiff and his wife tried to entrap the defendant into having improper relations with his wife, for the purpose of blackmailing him or getting money from him, then plaintiff cannot recover.[7]

(c) If you find from the evidence that the defendant did have sexual intercourse with the plaintiff's wife, and also find that prior to such intercourse the plaintiff had reason to know his wife was guilty of improper conduct with the defendant, suspected her of it, and yet took no means to prevent an intercourse between them, you may consider such omission on his part in determining what, if any, damage he is entitled to recover from the defendant for seducing his wife.[8]

SEDUCTION.

§ 502. Seduction Defined. If the jury believes that appellee seduced, debauched, and carnally knew plaintiff's daughter, E. S., and that by reason or means of such seduction and carnal knowledge by

7—Smith v. Meyers, 52 Neb. 70, 71 N. W. 1006. "Construing the foregoing in connection with the instructions given on behalf of plaintiff, we are convinced it was made plain to the jury that there could be no recovery in this case if the adultery charged was committed by the wife with the consent or connivance of her husband."

8—Lee v. Hammond, 114 Wis. 550, 90 N. W. 1073 (1076). The court said: "The law seems to be well settled that the husband cannot 'be charged with connivance or consent merely because he was negligent in respect of his wife's conduct, and so permitted opportunities for crime when he had no suspicion of her infidelity.' Even when he suspects her, he may, in order to obtain proof of her unchastity, leave open the opportunities which he finds, so long as he does not make new ones or invite the wrong.' 8 Am. & Eng. Enc. Law (2d Ed.) 264. 'To constitute a defense to such an action, the acts of plaintiff must have been such as to warrant the conclusion that he assented to the wife's infidelity.' Stumm v. Hummel, 39 Iowa 478. So it has been held in Massachusetts that: 'A husband who does nothing to encourage his wife to commit adultery, and does not, directly or indirectly, throw opportunities therefor in her way, but who, suspecting her thereof, watches her, and suffers her to avail herself of an opportunity which she had already arranged for without any knowledge on his part, is not guilty of connivance, even if in so doing he hopes to obtain proof which will entitle him to a divorce and purposely refrains from warning her for that reason.' Wilson v. Wilson, 154 Mass. 194, 28 N. E. 167, 12 L. R. A. 524, 26 Am. St. Rep. 237. A quite similar ruling was made in Iowa, where it was held that: 'A husband is not chargeable with collusion in allowing another to have criminal conversation with his wife from the fact that, after having his suspicions aroused, he, for the purpose of watching her, leaves open existing opportunities, where he does not create new ones or invite the wrong.' Puth v. Zimbleman, 99 Iowa 641, 68 N. W. 895. In that state it has been held that to be available, the plaintiff's consent and connivance must be specially pleaded. Morning v. Long, 109 Iowa 288, 80 N. W. 390."

defendant of said daughter, said daughter became pregnant, etc., they should find for appellant.[9]

§ 503. **Consent Obtained Through Affection and Confidence.** If an unmarried man by his visits and attentions to an unmarried female gains her affections and confidence and importunes her to sexual intercourse with him, and she, through her love for and confidence in him, yields to his solicitations, this is seduction.[10]

9—Stowers v. Singer, 113 Ky. 584, 68 S. W. 637.

10—Smith v. Yaryan, 69 Ind. 445, 35 Am. St. Rep. 232.

See Seduction, general heading Criminal.

CHAPTER XXVIII.

ALTERATION OF WRITTEN INSTRUMENTS.

See Erroneous Instructions, same chapter head, Vol. III.

§ 504. Alteration After Execution and Delivery of Instrument. (a) You are instructed that if you believe, from the evidence in this case, that, when the note sued on was originally made, it contained the words "one hundred" written in the blank in the body of the note before the printed word "dollars," and that after it was signed and indorsed by S., and the defendant M., it was altered without the knowledge, authority or consent of said M., by erasing the word "one" and writing in the word "thirteen" where the word "one" originally was, then you will find the issues for the defendant.[1]

(b) If the jurors believe from the evidence that the alteration in the rate and the time of drawing interest was made after the delivery of the note by the defendant company to the payee, without the knowledge or consent of the defendant, then they should find for the defendant.[2]

§ 505. Alteration While in Possession by Agent. If you believe from the evidence that the change in the date of the note sued on herein was made with the knowledge or consent of the plaintiff, by his agent, and that his agent in making such change was acting within the scope of his authority and without the knowledge or consent of the defendants, then you will find a verdict for all the defendants.[3]

1—Merritt v. Boyden & Son, 191 Ill. 136, 60 N. E. 907, 85 Am. St. 246.

2—Humphrey Hardware Co. v. Herrick, — Neb. —, 101 N. W. 1016.

3—McDonald et al. v. Nalle, — Tex. Civ. App. —, 91 S. W. 632. In comment the court said: "This charge is assigned as error, upon the contention that it required the jury to find all the facts necessary to establish two defenses relied on by the defendants before they could find a verdict for them; whereas, the establishment of either would entitle them to a verdict. In three instances, and one of comparatively recent date, our Supreme Court has held that a charge so framed is not subject to

§ 506. **Raised Check.** (a) The jury are instructed that, if they find, from the evidence, that the F. C. Nat. Bank on or about ——— issued its draft upon the plaintiff for the sum of $35, payable to the order of F. H., and delivered it to him for that sum, but afterwards the said draft was fraudulently raised by said F. H., or some person unknown, so that it purported to be drawn for the sum of $3,500 instead of for the sum of $35 only, without the knowledge or consent of the said F. C. Nat. Bank, the drawer thereof, and that afterwards the said draft so fraudulently raised and altered as aforesaid was presented to the plaintiff for certification and acceptance, and that thereupon the said plaintiff, by its duly authorized agent in that behalf, without knowledge that said draft had been changed or altered, endorsed upon said draft the following words: "Accepted payable through Chicago Clearing House February 13th, 1894, when properly endorsed. M. Nat. Bank, by P. P., teller," and that the said draft was by the said F. H. deposited for credit in the Am. T. & S. Bank of Chicago, and that the same was by said Am. T. & S. Bank endorsed and delivered to the defendant, and that afterwards said plaintiff paid to the defendant in the usual course of business the full sum of said $3,500, being the amount of said draft after the same had been so fraudulently changed and raised as aforesaid, instead of the sum of $35, being the sum for which said draft was actually drawn, without knowledge of the fact that it had been so raised and changed, and that subsequently and within a reasonable time after the discovery of the fact by the plaintiff that said draft had been fraudulently changed and altered as aforesaid from $35 to $3,500 (if the jury find, from the evidence, that it had been so fraudulently changed and altered), demand was made by the plaintiff on said defendant for repayment of said amount so received and collected on said draft in excess of $35, the sum for which it was originally drawn, and that payment thereof by said defendant was refused, then the jury are instructed that the plaintiff had a right to recover of the defendant in this action the sum of $3,465.

(b) The jury are further instructed that in case they find, from the evidence, the plaintiff is so entitled to recover from said defendant the sum of $3,465, and if they further find, from the evidence, that there has been unreasonable and vexatious delay in the payment of the sum by the said defendant to the said plaintiff, they may allow interest thereon at the rate of five per cent. per annum.[4]

§ 507. **Adding Additional Name, Material.** The court instructs the jury for the defendant, that under the plea of *non est factum,*

the criticisms urged in this case, Tex. & P. Ry. Co. v. Brown, 78 Tex. 402, 14 S. W. 1034; Saline & E. T. Ry. Co. v. Wood, 69 Tex. 679, 7 S. W. 372; Gulf C. & S. F. Ry. Co. v. Hill, 95 Tex. 629, 69 S. W. 136."

4—Metropolitan Bank v. Merchants Bank, 182 Ill. 367, aff'g 77 Ill. App. 316, 55 N. E. 360.

in this case, they must not only determine whether the defendant signed the note, but whether the note has been materially altered since it was executed and delivered by the defendant and his co-makers to the plaintiff's assignor, and if the jury believe from the evidence in this case that after the execution and delivery of the note in controversy in this case, the said ———— procured the signature to said note of one ————, without the knowledge or consent of defendant, that such alteration would be material and would discharge the defendant from any liability on the same. And if they so believe, the jury should find for the defendant.[5]

§ 508. **Filling in Blank Space—Material Alteration.** (a) The jury are instructed that if you believe from the evidence that the note in question was signed and indorsed by the defendant ———— and one S., and delivered by defendant to S. to negotiate, and that at the time said note was so signed and delivered to said S. only the word "hundred" was written therein, and that a space was left blank before the word "hundred" sufficient to write therein the word "thirteen," and that said S. wrote or caused to be written in said blank space the word "thirteen" so that the body of said note read "thirteen hundred dollars," and then sold or caused to be sold the said note to the said plaintiff, and that said plaintiff purchased said note in the due course of business before maturity for value in good faith and without notice of such change; then the defendant ———— is liable in this case for the face of said note and interest thereon, and you should so find by your verdict.[6]

(b) The law is that, if a promissory note is signed by a party, as surety or guarantor, while blank as to (time and place of payment) and in this condition is intrusted to the principal to deliver to the payee, and the principal fills up these blanks differently from what had been agreed upon, then the surety or guarantor makes the principal his agent for filling such blanks, and he will be bound by the note as thus filled up.[7]

(c) The law is, that if a party to a negotiable instrument, intrust

5—Soaps v. Eichberg, 42 Ill. App. 375. The court said: "The addition of another maker to a note may operate to greatly damage and prejudice all other payors, and when, as in this case, the addition is made with the assistance and complicity of the holder, it must be deemed and held a material alteration and to destroy the validity of the note as evidence. 2 Parsons on Notes and Bills, 557, 561, 571 and 581; Nicholson v. Combs, 90 Ind. 515, 46 Am. Rep. 229; Hamilton v. Hooper, 46 Ia. 515, 26 Am. Dec. 161; Addison on Contracts, Sec. 1280; Haskell v. Chanion, 30 Mo. 126; Wallace v. Jewell, 21 Ohio St. 163, 8 Am. Rep. 48; Sheriff v. Suggett, 9 B. Mon. 8 (Ky.)."

6—Merritt v. Boyden & Son, 191 Ill. 136, aff'g 93 Ill. App. 613, 60 N. E. 907, 85 Am. St. 256. "In the hands of a bona-fide holder without notice, a negotiable instrument may be enforced if a sum in excess of what was authorized by the maker is inserted in a blank left for the amount of the instrument. * * * Abbott v. Rose, 62 Me. 194, 16 Am. Rep. 427; Fordyce v. Kozminski, 49 Ark. 42, 4 Am. St. Rep. 18; Angle v. N. W. Mutual Life Ins. Co., 92 U. S. 340."

7—Gottrupt v. Williamson, 61 Ind. 599.

it to the custody of another with blanks not filled up, whether it be for the accommodation of the person to whom it is intrusted, or to be used for his own benefit, the instrument carries on its face an implied authority to fill up the blanks and perfect the instrument. As between such party and an innocent third party, the person to whom the note was intrusted, must be deemed to be the agent of the party who committed the instrument to his custody.[8]

§ 509. **Same Subject—Immaterial Change—Where One of Two Innocent Persons Must Suffer.** (a) If you find the note sued upon in this case was drawn up with the words "in a Bank at Elkhart, Ind.," leaving a blank space before the word "Bank" in said note, then the payee of the note would have had the legal right to add the words "First National" before the word "Bank"; and if that is all he did, your verdict will be for the plaintiff. This he could do without committing forgery, with or without the consent of the maker.

(b) If one of two innocent people must suffer, the one must lose who put it in the power of another to fill up the blank and sell it to innocent purchasers.[9]

§ 510. **Changing Agreement as to Quality of Material to Be Furnished—Liability.** (a) The jury are instructed that the parties had the right to make as many agreements as they chose for the delivery of the material specified in the petition, and to change their agreements as to the quality of the material to be furnished, and as to the prices to be paid therefor, from time to time, and both parties would be bound thereby.

(b) Both parties would be bound by any agreement made for the delivery of material, both as to quality and price, and all other respects, until such agreement was changed by mutual consent, and all deliveries of material by the plaintiffs to the defendant will be referred by you to the agreement which may have been in force between the parties at the time of such delivery.[10]

8—Bank of P. v. Neal, 22 How. 96.

9—Pope v. Branch County Sav. Bank, 23 Ind. App. 210, 54 N. E. 835 (838).

10—Clarke v. Van Court, 34 Neb. 54, 51 N. W. 756.

CHAPTER XXIX.

ARCHITECTS.

See Erroneous Instructions, same chapter head, Vol. III.

§ 511. Architect's Certificate—Condition Precedent to Recovery. (a) The court instructs you that by the terms of the contract introduced in evidence the plaintiffs were to do the brick work and plastering on the defendant's building therein mentioned under the superintendence of the architect therein named, and payments were to be made upon estimates by such architect, from time to time, as the work should progress, not exceeding eighty-five per cent. upon the work done, and when all the work should be done and completed and so certified to by the architect, then the whole amount of the contract price or balance thereof unpaid, should be paid, and in order to entitle the plaintiffs to recover for any final balance under such contract or for any additional work done under the direction of such architect under the provision of the contract, it is incumbent upon the plaintiffs to prove that such final certificate was issued by the architect and that the same had been presented to the defendant and payment thereunder demanded.[1]

(b) The law is that where a contract for building a house provides that the work shall be done under the direction of an architect therein named, the price agreed upon to be paid upon his certificate that the, etc., then the certificate of such architect made in compliance with the agreement, is conclusive on the rights of the parties. And if such contract also provides that the architect's opinion, decision and certificate, shall in all matters pertaining to such contract and the erection of such building be binding and conclusive, then the certificate of such architect, if made in compliance with such contract, is conclusive on the parties, and his

1—Schenke v. Rowell, 7 Daly (N. Y.) 286; Sullivan v. Byrne, 10 S. C. 122, 30 Am. Rep. 37.

decision cannot be varied or appealed from unless for fraud or mistake on the part of the architect.[2]

§ 512. **Architect Fraudulently Refusing Final Certificate.** If you believe from the evidence in this case that the plaintiffs have failed to prove by the preponderance or greater weight of the evidence that the architect, J., fraudulently and in collusion with the defendant, F., refused to issue a final certificate to the plaintiffs, then your verdict should be for the defendant.[3]

§ 513. **Contractor May Recover When Architect Fraudulently Withholds Certificate.** (a) If you believe from the evidence and the instructions of the court that the architect or superintendent named in the contract in this case accepted the work performed by the plaintiffs as the work progressed, as required by the contract, and if you further find from the evidence that such contract was completed in accordance with the terms thereof, and you further believe from the evidence that after the contract was completed the architect accepted the work performed by the plaintiffs, and if you further believe from the evidence and instructions of the court that the architect withheld or refused to deliver to the plaintiffs his statement or certificate in writing showing the amount due the plaintiffs, if anything, either because the defendant, the owner, directed him, the said architect, to withhold or not to deliver the same, or for any other reason not in accordance with the terms of the contract between said parties if shown by all the evidence in this case, then you are instructed if you find such facts proven from the evidence, that the plaintiffs would not be bound to produce such certificate before they were entitled to recover in this case.[4]

2—Schenke v. Rowell, 7 Daly (N. Y.) 286; Sullivan v. Byrne, 10 S. C. 122. That producing the architect's certificate may be waived, see Hayden v. Coleman, 73 N. Y. 567.

3—Fitzgerald v. Benner, 219 Ill. (497), 76 N. E. 709.

4—Fitzgerald v. Benner, 219 Ill. 497, 76 N. E. 709, aff'g. 120 Ill. App. 447 (453). "This instruction," said the Appellate Court, "is vigorously attacked by appellant. It is said to assume 'the important and closely disputed proposition of fact' that 'the owner directed' the architect 'to withhold or not to deliver' his certificate. Although this contention is strenuously pressed and numerous cases in this court and in the Supreme Court are brought to our attention where, as it is urged by appellant, a similar construction has been given in similar words, we are entirely unable to see that there is any such assumption in the instruction when its language is construed according to its natural and obvious meaning. The second objection made to the instruction is that it told the jury in effect that if the work was actually completed in accordance with the terms of the contract and the architect erroneously decided that it was not, then the jury should disregard the decision of the architect and find a verdict for the plaintiff, whereas the law is that as the contract makes the architect the final arbiter of all disputes between the parties, no recovery could be had without showing actual fraud on the part of the architect. This objection rests on the use of the words 'or for any other reason not in accordance with the terms of the contract,' as it is evident that if the architect were by the contract the final arbiter of all disputes

(b) The court instructs the jury that if you believe from the evidence that the architect, J., in this case inspected the work in question and knew its character and quality, and that said architect accepted the work done and materials furnished by the plaintiff as being in compliance with and in full performance of the contract on plaintiff's part, and if you further believe from the evi-

concerning payments and refused to deliver it, the action would be fraudulent.

To excuse the production of the architect's certificate the burden of proving bad faith and a fraudulent purpose on his part was upon the plaintiffs. The instructions must be regarded as a series and together, and the jury was so informed."

When the case reached the Supreme Court, the following comment was delivered:

"This instruction is objected to upon the alleged ground that it assumes, as a fact, that appellant directed the architect to withhold and not deliver the final certificates to the appellees. The instruction is not justly subject to the criticism made upon it. The part of the instruction, which is said to contain the assumption complained of, is preceded by the words: 'If you further believe from the evidence,' etc., and is followed by the words, 'if shown by all the evidence in this case.' The jury were thus told to find from the evidence whether or not the architect refused to deliver the certificate, and were not directed to assume the non-delivery of such certificate as a fact. Shannon v. Swanson, 208 Ill. 52, 69 N. E. 869; Chicago City R. Co. v. O'Donnell, 208 Id. 267, 70 N. E. 294, 299; Smith v. Henline, 174 Id. 184, 51 N. E. 227; Term. R. R. Co. v. Thompson, 210 Id. 226, 71 N. E. 328; Gerke v. Fancher, 158 Id. 375, 41 N. E. 982."

"The instruction is further criticised upon the alleged ground that it ignores the defense of the appellant, which defense is that the liquidated damages for the appellant amounted to more than the entire claim of the appellees, computed at the rate of $50.00 a day for the total period of delay. On this point counsel for the appellant say: 'The appellees were in default from September 29, 1892, until February 15, 1893, being a delay in all of (139) one hundred and thirty nine days, and the liquidated damages for the delays under the terms of the contract amounted to $6,950.00. Now the total amount of the appellees' claim was only $6,408.63, so if the testimony of the defendants' witnesses was true, even if the contract was completed in accordance with terms thereof, there was nothing due to the appellees.' The instruction was not erroneous in omitting the question of damages by way of set off, as it is not always necessary to negative mere matter of defense. The instruction does not assume to enumerate all, or any of, the elements essential to a recovery by the appellees. It simply relates to the question of excuse for the non-production of the architect's certificate. I. C. R. R. Co. v. Smith, 208 Ill. 608, 70 N. E. 628. An instruction, containing all the elements necessary to a recovery upon the plaintiffs' theory, is sufficient without negativing defensive matter or theories. C. U. T. Co. v. Leach, 215 Ill. 184; Mt. Olive C. Co. v. Rademacher, 190 Id. 538, 60 N. E. 888."

"This instruction is also objected to upon the ground that it told the jury that, if the plaintiffs completed the work in accordance with the terms of the contract, then they could recover, without any reference to the fraud of the architect, it being the contention of the appellant that the contract makes the architect the final arbiter of all disputes between the parties, so that his decision is conclusive, and no recovery could be had without showing fraud on his part. Whether or not the contract between the parties, made W. the architect, arbitrator of all disputes and questions of payment of money due under the contract, is a question which we do not deem it necessary to decide, because, even if appellant's contention upon this subject is correct, at least four instructions, given for the appellant, announced the construction of the contract contended for."

dence and under the instructions of the court that said contract was completed in accordance therewith, and you further believe from the said evidence that said architect in bad faith and without just cause refused to deliver to the plaintiffs a final certificate showing such completion and the balance due the plaintiffs, if any, then the plaintiffs are entitled to recover whatever, if anything, the jury shall find from the evidence is due upon the contract.[5]

(c) The court further instructs the jury that, if you believe from the evidence that the architect, J., in this case inspected the work in question and knew its character and quality, and that said architect accepted the work done and materials furnished by the plaintiffs as being in compliance with and in full performance of the contract on plaintiff's part, and if you further believe, from the evidence, and under the instruction of the court, that said contract was completed in accordance therewith, and you further believe from the evidence that said architect in bad faith and without just cause refused to deliver to the plaintiffs a final certificate, showing such acceptance and completion and the balance due the plaintiffs, if any, then the plaintiffs are entitled to recover whatever, if anything, the jury shall find from the evidence is due upon the contract.[6]

(d) If the jury believe from the evidence that the architect and superintendent named in the contract fraudulently and willfully refused to accept said work, without a cause, and fraudulently and willfully refused to give the plaintiffs an estimate showing the amount due them for performing the work done under the contract in this case (if you believe from the evidence they did so perform such work), and you further believe from the evidence the plaintiffs did perform the work and completed the building according to the plans and specifications, then you will find for the plaintiffs, and assess their damages for such sum, if any, as you may believe from the evidence remains due them.[7]

5—Fitzgerald v. Benner, supra. "We do not agree with appellant's contention that this instruction was erroneous. The ordinary construction of language applied to it relieves it from the objections urged against it. If the architect first, on full inspection of the work, adjudged it to be 'in compliance with and full performance of the contract' (it actually being so), and then in bad faith refused to give the plaintiffs a certificate, certainly the plaintiffs were entitled, without such a certificate, to recover 'whatever, if anything, was due on the contract.' The instruction plainly enough means this and nothing more, and the objections made to it are hypercritical."

6—Fitzgerald v. Benner, supra. "This instruction is said to be erroneous upon the alleged ground that it told the jury that, if the architect refused to deliver to the appellees a final certificate 'in bad faith and without just cause,' appellees were entitled to recover. The instruction is charged with being defective, as not stating to the jury what facts constituted 'bad faith and without just cause.' We think the instructions, taken as a whole, clearly informed the jury what facts, under the circumstances of this case, would amount to bad faith and the absence of just cause. If the architect inspected the work and accepted it as being in compliance with the contract, and then refused to deliver the certificate, he was guilty of bad faith."

7—Lauman v. Clark, 73 Ill. App. 659. "We think there was evidence

§ 514. Architect Cannot Without Cause Withdraw Acceptance of Work. If you believe from the evidence that the superintendent named in the contract in this case accepted the work performed by the plaintiff, as the work progressed, as required by the contract, and was satisfied with it, and you further believe from the evidence that after the contract was completed, he accepted the work performed by the plaintiff, except as to the brick work and some other work which he had accepted prior to the completion of the contract, then you are instructed that, in law, this was an acceptance of the whole; that the architect, when he once accepted the work, would have no right to withdraw his acceptance without good cause and refuse to accept the work.[8]

§ 515. Reasonable Charge for Services—Requisites in Suit For. (a) You are instructed that if one person requests another to perform certain services for him, and the person so called upon performs such services in reasonable compliance with such request, and no amount of compensation is agreed upon between the parties to be paid and received for the performance of such services, then the person performing such services in reasonable compliance with the request made of him is entitled to recover from the person for whom he performs such services the reasonable value of the services so performed by him.[9]

(b) * * * If you find that the plaintiff was employed to make, prepare and furnish to and for the defendant L. plans and specifications for the proposed erection and construction of two certain flat buildings, then, in order to entitle said plaintiff to recover any compensation therefor, he must show the delivery of such plans and specifications to the defendant L. or a tender of them to the defendant L. I further instruct you that the burden of proof is upon the plaintiff that the contract relating to the flat buildings was actually made and that the minds of both parties actually met.

(c) If your minds, gentlemen, are satisfied by a preponderance of all the evidence in the case that the parties did contract, as the plaintiff contends they did, and as set forth by the court in its charge —that is to say if the minds of the parties plaintiff and defendant met on the proposition contended for by the plaintiff, then your verdict should be for the plaintiff. But if, from a preponderance of the evidence in the case your minds are not so satisfied or convinced, then your verdict should be for the defendant.

If you believe from a preponderance of all the evidence in the case that the minds of the parties did not meet as to the new work —that is to say as to the flat buildings—and that there was no agree-

that warranted giving this instruction and that it correctly states the law," citing Fowler v. Deakman, 84 Ill. 130; Cook Co. v. Harms, 108 Ill. 151.

8—Lauman v. Clark, 73 Ill. App. 659.

9—Buckler v. Kneezell, — Tex. Civ. App. —, 91 S. W. 367 (370).

ment consummated as to the same, then your verdict should be for the defendant.[10]

§ 516. **Guarantee of Skill—Negligence or Want of Skill Causing Loss.** (a) Uncontradicted and admitted facts in this case are that defendants are architects, and as such engaged themselves to plaintiffs to draw plans for and superintend the construction of plaintiffs' mule barn. Now, by such engagement the defendants guarantied to plaintiffs that they (defendants) had and possessed the necessary skill, and that they would use proper care, to draw said plans and superintend the construction of said building in a workmanlike manner, and if they did not possess such skill, or if they were negligent in their conduct in the premises, and such want of skill or such negligence caused a loss to plaintiffs in the particulars complained of, then defendants are liable to plaintiffs for such loss.

(b) If you find from the evidence that defendants drew the plans and submitted them to plaintiffs, and that the plans so submitted were agreed upon between them, and that the building was afterward constructed in accordance with such plans, except changes mutually agreed upon, then plaintiffs cannot recover, even though there may have been a misunderstanding between them as to the particulars complained of, unless such misunderstanding was caused by a want of skill or by negligence on the part of the defendants.

(c) If you find from the evidence that plaintiffs explained to defendants the elevation they desired for the floor of said barn and of the "mule alley" thereof, and instructed them to place the same upon a certain level, and to have the same constructed on a level plane, with a raise of three inches at the door from the curb level in front, and with another raise of six inches at the south end of the mule alley, and if you further find from the evidence that defendants undertook and agreed to cause the floor to be constructed in such manner, and if you further find from the evidence that defendants, by any want of skill, or by any negligence on the part of either of them, caused said floor to be constructed in such manner, and if you further find that they were put to a greater outlay in excavating and filling, and in the building of walls than they would have been, had the floor been placed as agreed upon, then plaintiffs are entitled to recover of defendants the amount of such unnecessary outlay. And if, under such circumstances, the building as constructed is less valuable than the same would have been if constructed according to such agreement, then plaintiffs are entitled to recover of the defendants an amount equal to such difference in value. It is incumbent on the plaintiffs to prove the facts necessary to a recovery as above set forth by a preponderance or greater weight of the evidence; and, unless they have done so, your verdict should be for the defendants.[11]

10—Graf v. Laev, 120 Wis. 177, 97 N. W. 898.

11—Dysart-Cook Mule Co. v. Reed et al., 114 Mo. App. 296, 89 S. W. 591. "The plaintiff's criticism of the first instruction is as

§ 517. Proof of Plans Having Been Made—Circumstantial Evidence Defined. The facts as to whether or not the plaintiff made the plans, drawings, specifications, etc., charged for at the request of C. N. B., and they were prepared as directed by him, and were placed at his disposal for use by or for him, may each and all be established by circumstantial, as well as direct, evidence. Direct evidence is proof of the facts by witnesses who saw the acts done or heard the words spoken. Circumstantial evidence is the proof of collateral facts and circumstances from which the mind arrives at the conclusion that the main facts sought to be established in fact existed; and if all the facts and circumstances introduced in evidence, taken together, lead your minds to the conclusion that the facts above stated existed, you will so find.[12]

follows: (a) The instruction is vague, and leaves the jury to guess at what the court meant by the language 'or if they were negligent in their conduct in the premises.' (b) The term 'proper care' is not explained or defined in the instruction or any other instruction. (c) It entirely overlooks the allegation of the petition that defendants represented the plans to be of a character different from what they were in fact. (d) It limits liability of defendants to want of skill in drawing the plans, or to want of skill in superintending the building, or to negligence in drawing plans, or to negligence in superintending the work. Whereas they are liable, if they misrepresented the plans, no matter how skillfully the plans were drawn, and no matter how skillfully the work may have been done. And they are liable, even if the plans were skillfully drawn, and even if the work was skillfully done, if the completed work did not give plaintiff the building contracted for. This may not have been the result of negligence. There is nothing vague or uncertain in the language of the instruction. If there are terms which plaintiff thought should be explained to the jury, why did it not ask an instruction properly defining such terms? Why lie by and wait the chances of a favorable verdict before making complaint, if it apprehended that the jury would not understand the meaning of terms used in the instruction as given, which is not erroneous? In these circumstances plaintiff must abide the result. Merrill v. City of St. Louis, 12 Mo. App. loc. cit. 479; Construction Co. v. Wabash R. R. Co., 71 Mo. App. 626; Wheeler v. Bowles, 163 Mo. 398, 63 S. W. 675."

12—Buckler v. Kneezell, — Tex. Civ. App. —, 91 S. W. 367 (370).

See also chapter on Building Contract.

CHAPTER XXX.

ASSAULT—CIVIL.

See Erroneous Instructions, same chapter head, Vol. III.

§ 518. Assault Defined—Personal Rights—Pointing Loaded Revolver. (a) The court instructs the jury, that every person has a right to complete and perfect immunity from hostile assaults that threaten danger to his person—a right to live in society without being unnecessarily or wrongfully put in fear of personal harm; and an assault is an attempt with unlawful force to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented.[1]

(b) You are instructed that wantonly and recklessly pointing a revolver at another, when but a few feet away, under such circumstances as would instantly lead such other to believe it to be loaded, would be an assault, whether such revolver was in fact loaded or not, if you find from the evidence that the act of the person holding such revolver was such as to cause a reasonable person to believe that he intended to do harm with it.[2]

§ 519. Assault and Battery Defined. The jury are instructed that an assault and battery consists in an injury actually done to the person of another in an angry or revengeful, rude or insolent manner. Any unlawful beating of another, however slight, is an assault and battery; and the degree of bodily pain and injury, if the assault and battery are proved, is only important as affecting the measure of damages.[3]

1—Harrison v. Ely, 120 Ill. 83, 11 N. E. 324.
2—Atkins v. Gladwish, 27 Neb. 816, 44 N. W. 37 (38).
3—Harrison v. Ely, 120 Ill. 83, 11 N. E. 334.

§ 520. **Presence Alone Not Sufficient—Must Take Part In or Assent to Assault.** If the jury find that the plaintiff went to the house of the defendant D. without the use of force, actual or threatened, to oblige him to do so; and if the jury further find that the defendants who went to plaintiff's office went there without any purpose to compel him to go to D.'s house, against his will,—then the defendants, other than Father D., are not responsible or liable for any blow or blows struck, or acts done there, merely because they were present. To make them liable for what transpired there, they must either have taken part in it, or must have known beforehand that it was to be done, or assented to it, and countenanced it, at the time it was done.[4]

§ 521. **Injury Through Plaintiff's Fault.** If the jury believe, from the evidence, that the defendant had a pistol in his hands, but was not attempting to discharge it towards the plaintiff, and that the plaintiff assaulted the defendant, and by pushing and jostling him, caused the pistol to go off and thereby received an injury, without any intention on the part of the defendant that the pistol should be discharged, then the defendant would not be liable in this action for any injury consequent upon the discharge of the pistol.[5]

§ 522. **Voluntarily Engaging in a Conflict.** If plaintiff voluntarily engaged in a fight with defendant he cannot recover damages, unless it appeared defendant beat him excessively and unreasonably.[6]

§ 523. **Accidental Injury to Trespasser Not Assault.** If you find that plaintiff while unlawfully trespassing upon the lands of the defendant, against the will of the defendant, and after the defendant had commanded her to leave his premises, was accidentally struck by a board or stake while defendant was removing the same, then and in that case the defendant would not be liable for the injury occasioned by such blow, if the same was not purposely inflicted by him.[7]

§ 524. **Joint Liability of Assailants.** When several persons unite in an act which constitutes a wrong to another, intending at the time to commit the act, or do it under circumstances which fairly show that they intended the consequences which followed, then the law will compel each to bear the responsibility of the misconduct of all, and the party injured is at liberty to enforce his remedy against all, or against any one or more of the number.[8]

Although the jury may believe, from the evidence, that the defendant C. proved up his claim before the justice of the peace, as testified to by the plaintiff, still, unless you further believe, from the evidence,

4—Grace v. Dempsey, 75 Wis. 313, 43 N. W. 1127.

5—Kral v. Lull, 49 Wis. 403, 5 N. W. 874.

6—Evans v. Elwood, 123 Iowa 92, 98 N. W. 584 (585).

7—Lansing v. Wessell, 5 Neb. (unof.) 199, 97 N. W. 815.

8—Page v. Freeman, 19 Mo. 421; Wright v. Lathrop, 2 Ohio 33; Turner v. Hitchcock, 20 Ia. 310.

that the said C. aided, advised or assisted in the arrest of the plaintiff, then you should find the said C. not guilty, unless you further find, from the evidence, that since the arrest he has approved or adopted the acts of those who did cause it.[9]

§ 525. **Aiding or Encouraging—Liability For.** And if any one incites, advises, or encourages an unlawful assault and battery, then he is also liable as principal, and to the same extent as though he had actually participated in committing the assault, and inflicting the injury.[10]

§ 526. **Self-Defense—Excessive Force.** (a) Though the jury should believe, from the evidence, that the plaintiff made the first assault upon the defendants or some one or more of them, still, if they further believe, from the evidence, that the defendant, when so attacked, repelled plaintiff's assault with more force and violence, and did more injury to the plaintiff, than was reasonably necessary for their own protection from injury at his hands, then, as a matter of law, the defendants using such excessive force would be guilty of assault and battery, and you should so find by your verdict.[11]

(b) If the jury believe, from the evidence, that the plaintiff made the first assault upon the defendant, then the defendant had a right to resist force by force, and to use so much force as was reasonably necessary to defend himself; and in case the jury find, from the evidence, that the plaintiff made the first assault upon the defendant, then to warrant a verdict for the plaintiff, the burden of proof is upon him to show that the defendant did use more force than was reasonably necessary under the circumstances to defend himself.[12]

(c) Under the pleadings in this case, the only question for the jury to determine is, whether the defendants, or either of them, committed an assault and battery upon the person of the plaintiff, as charged in the declaration; and if you find, from the evidence, that the defendants, or either of them, committed the assault and battery complained of, it cannot be claimed, as a justification for such assault by the defendant or defendants, that the plaintiff made the first assault.[13]

(d) The jury are instructed that, even if they believe that the defendant used more force than was absolutely necessary at the time of the occurrence complained of, still there can be no recovery in this case if the jury believe, from the evidence, that said defendant acted as a reasonably careful man would have acted under the same circumstances and conditions. If the conduct of the plaintiff at that time was improper or boisterous, or insulting, or disorderly, and was

9—Cooley on Torts, 3d Ed. 218; Averill v. Williams, 4 Denio 295; Abbott v. Kimball, 19 Vt. 551; Snydacker v. Brosse, 51 Ill. 357.

10—Cooley on Torts, 3d Ed. 223, 224, 1029; Barden v. Felch, 109 Mass. 154; 2 Hill on Torts 293.

11—Cooley on Torts, 3d Ed. 277; Adams v. Waggoner, 33 Ind. 531, 5 Am. Rep. 230; Close v. Cooper, 34 Ohio St. 98.

12—Ayers v. Bristol, 35 Mich 501.

13—1 Chitty on Plead, 501; 2 Greenl. Ev. § 95.

such as to naturally irritate, annoy and excite an ordinarily careful and prudent man in the place of said defendant under the same circumstances and conditions, then the said defendant cannot be held to the greatest nicety in the calculation of the amount of force which he should use, and even if the said defendant did use more force than was necessary, still if under the circumstances he acted as an ordinarily careful and prudent man under the influence of plaintiff's conduct, as you find it to be, would have acted under the same circumstances and conditions, then you should find the defendant not guilty.[14]

§ 527. **Justifiable Defense—Accident Resulting Therefrom.** If plaintiff attempted to ride his horse upon or against the defendant in the highway, and thereupon the defendant, acting as a reasonable man, armed himself with a stick or similar weapon for the purpose of defense against such threatened injury, and that such movement on his part had the effect to frighten plaintiff's horse, and thereby plaintiff was injured, then defendant would not be liable for damages so inflicted.[15]

§ 528. **Self-Defense—A Right and a Duty—Expelling Disorderly Person or Trespasser.** (a) The right of self-defense is derived from nature. To repel force by force is the common instinct of every creature that has means of defense. Sudden and strong resistance to unrighteous attack is not merely a thing to be tolerated—in many cases it is a moral duty. Municipal law has left to individuals the exercise of this natural right of self-defense in all cases in which the law is either too slow or too feeble to stay the hand of violence, and it is to be considered that a man repelling imminent danger cannot be expected to use as much care as if he had time to act deliberately.[16]

(b) The jury are instructed that if the plaintiff leaned over the partition fence and attempted to interfere with the ladder, the defendant had the right to use such force upon her as was reasonably necessary to cause her to desist and to expel her from his premises.[17]

14—In Illinois Steel Co. v. Wagnius, 101 Ill. App. 535, action for damages for assault by the steel company's watchman, judgment for plaintiff was reversed because the above instruction was not given. The court cited the following cases: Donnelly v. Harris, 41 Ill. 126; Ogden v. Claycomb, 52 Ill. 365; Woodman v. Howell, 45 Ill. 367, 92 Am. Dec. 221; Boren v. Bartelson, 39 Ill. 43; Paxton v. Boyer, 67 Ill. 132, 16 Am. Dec. 615, and Steiner v. People, 187 Ill. 244, 58 N. E. 383.

15—Halley v. Tichenor, 120 Ia. 164, 94 N. W. 472 (473).

16—Norris v. Whyte, 158 Mo. 20, 57 S. W. 1037 (1039). "The above instruction asked by the defendant, and refused by the court, is correct, as an abstract proposition of law, and might be given in any case of assault and battery where a plea of self-defense is interposed."

17—Hannabalson v. Sessions, 116 Ia. 457, 90 N. W. 93 (95). The court said: "The general doctrine announced in the instruction is in our judgment correct. The mere fact that plaintiff did not step across the boundary line does not make her any less a trespasser if she reached her arm across the line, as she admits she did."

(c) If a person enters upon the possession of another, and is requested to depart and refuses to do so, the owner of the premises may lawfully eject him therefrom; provided, he uses no more force than is reasonably necessary for that purpose.[18]

§ 529. Parent Whipping Child. One possessed of the duty of rearing a child has a right to give it moderate correction and punishment, in a reasonable manner, for the child's benefit, for its education and discipline. This would be for offenses on the child's part, such as disobedience, or where the child is guilty of something bad or immoral in its nature. Whipping or punishment, however, when administered to an extent greater than is reasonably necessary under the circumstances, would amount to assault; and, when so administered, one would be responsible for any damages arising therefrom as its proximate result.[19]

§ 530. Entry Under Legal Process—Whether Assault Was Committed. If the jury believe that the defendant went to the house of the plaintiff for the purpose of identifying certain property to the sheriff, under a writ of replevin issued at the instance of the defendant, and with no intention to assault the plaintiff, or do her any injury, and did not in fact assault and beat, or do any injury to, the plaintiff while thus upon said premises, or at any other times, then their verdict must be for the defendant.[20]

§ 531. Wrongful Arrest Without Warrant. (a) If the jury find that the plaintiff sat in the alley quietly, and committed no breach of the peace, and defendants had no warrant for the plaintiff, then the defendants, if acting in concert, are liable to plaintiff; and, in any event, such of the defendants are who assisted in the beating of the plaintiff, if the jury find she was beaten, and her clothing torn.[21]

(b) The court instructs the jury, that the law is, that all parties who engage in making an illegal or unlawful arrest, are trespassers; and if the jury believe, from the evidence, that the defendants, or either of them, restrained the plaintiff of his liberty, as charged in plaintiff's declaration, and without authority of law, as explained in these instructions, then such persons are liable to the plaintiff in this action.[22]

(c) If the jury believe, from the evidence and under the instructions herewith given, that the defendants M. and M. were both engaged in the common purpose of unlawfully arresting the plaintiff, and that M. had laid hold of the plaintiff, and that M. immediately afterwards, in pursuance of said common purpose of unlawfully arresting said plaintiff, struck said plaintiff with a club, and that

18—Woodman v. Howell, 45 Ill. 367; McCarty v. Fremont, 23 Cal. 196; Harrison v. Harrison, 43 Vt. 417; Cooley on Torts, 3d Ed. 292.

19—Clasen v. Pruhs, 69 Neb. 278, 95 N. W. 640.

20—Thillman v. Neal, 88 Md. 525, 42 Atl. 242.

21—Zube v. Weber, 67 Mich. 52, 34 N. W. 264 (269).

22—Newell, Mal. Pros. 371; Bath v. Metcalf, 145 Mass. 274.

said striking was done in the presence of M., and that M. did not try to prevent the same, but on the contrary thereof, adopted and approved said act of said M. in striking said plaintiff, then the jury are instructed that said M. is as responsible in this action for said striking as is M.[23]

§ 532. **Words of Provocation—Mitigation of Damages.** (a) That, while words of provocation do not justify an assault and battery, they may properly be considered in mitigation of damages; and if the jury believe, from the evidence, that, just before the assault complained of, the plaintiff used words to the defendant calculated to provoke a breach of the peace, and menaced the defendant with his fists, then such facts and circumstances may be considered by the jury in mitigation of damages, in case they find the defendant guilty.[24]

(b) Defendant admits he struck the plaintiff, but undertakes to justify it, as he expressed it, because he called his wife a "damn liar." The law requires me to charge you that would not be sufficient justification. No one has the right to take the law in his own hands, and punish some one who has done a real or imaginary wrong. If the wife had been damaged, the courts were open to him, and it was his duty to come to court and seek redress for his grievances. The defendant had no right to measure the amount of punishment he should inflict upon the plaintiff; therefore, if he struck and beat him for having called his wife a "damn liar," he violated the law, and made himself liable to a civil action. Now, it becomes a question to determine, has he damaged the plaintiff by beating him, and if so, to what extent? You heard the witness detail the evidence as to the injuries. It is for you to estimate what amount of injury he has received, and for what amount he should be compensated. In estimating that damage you are at liberty to consider under what circumstances the injuries were inflicted. Was it done with wanton, reckless disregard of the rights of the plaintiff? If so, then you are at liberty to add smart money against the defendant for having inflicted the wrong, to hold him up as an example to others, and to compensate the plaintiff for whatever damage he has sustained.[25]

§ 533. **Justification—Retaking Stolen Property.** (a) If the plaintiff was removing the plums belonging to the defendant without lawful right, then the defendant would be justified in attempting to take them from her, and could use sufficient force to compel the plaintiff to give them up.

(b) If the plums, which are the property in question in this case,

23—Mullin v. Spongenberg, 112 Ill. 142. See also Whitney v. Turner, 1 Scam. (Ill.) 253.

24—Keyes v. Devlin, 3d E. D. Smith 518; Ireland v. Elliott, 5 Clarke (Ia.) 478; Suggs v. Anderson, 12 Ga. 461; Brown v. Swineford, 44 Wis. 282; Burke v. Melvin, 45 Conn. 243.

25—Hayes v. Sease, 51 So. Car. 534, 29 S. E. 259.

belonged to the defendant, and the plaintiff was attempting to remove them without consent or lawful authority from the defendant, and they belonged or were under the control of defendant, he had a right to prevent her from so doing. But in the case suggested—that is, should you find that the plaintiff had no legal right to the plums, and that the defendant was seeking to retake only what belonged to him—he would only have had a right to use sufficient force to overcome the force used by plaintiff in taking away the plums. Defendant would have no right to use more force than was reasonably necessary, under all the circumstances, to retake them; and, should you find that he did use more force than was reasonably necessary, he would be liable for such damages as were occasioned by such excessive use of force.[26]

(c) The court instructs the jury that, if they believe, from a preponderance of the evidence, that at the time of the alleged assault, the plaintiff had in his possession and was in the act of carrying away from the defendant's premises a certain list of defendant's customers with the intention on the part of the plaintiff of keeping the same and converting the same to his own use, and if you further believe, from a preponderance of all the evidence, and under the instructions of the court, that such a list was then the property of the defendant, you are instructed, as a matter of law, that the defendant had the lawful right to take such list of customers from the plaintiff's possession, using such force in so doing as was reasonably necessary to prevent the plaintiff from taking such list of customers away from defendant's premises.

(d) And if you further believe, from a preponderance of all the evidence, that in preventing the plaintiff from so carrying away such list of customers (without malice and without willful intent to injure the plaintiff, and using only such force as a reasonably prudent man would, under like circumstances, deem sufficient to prevent such carrying away), the defendant unintentionally injured the plaintiff, you are instructed as a matter of law that the plaintiff cannot recover, and that your verdict should be for the defendant.

(e) The court instructs the jury as a matter of law that when a person is without right in the act of carrying away the property of another from the owner's premises with the intention of converting the same to his own use, he is a wrongdoer, and the law does not require the owner to stand idly by and allow such wrongful carrying away, and that in such case the owner has the lawful right to demand his property and in case such demand is refused by force to prevent such carrying away and to retake his property, provided he uses only such force as is reasonably necessary to prevent such carrying away or conversion of the property in question.[27]

26—Hamilton v. Arnold, 116 Mich. 684, 75 N. W. 133 (134).

27—Winter v. Atkinson, 92 Ill. App. 162 (165). The court said: "If a chattel has been seized and carried away by a person who has

§ 534. Ejecting Person from Store—May Use Necessary Force—Series. (a) If the jury believe from the evidence that the defendant violently struck and beat the plaintiff, then your verdict will be for the plaintiff, unless you further believe from the evidence that plaintiff first made an attack upon defendant, and that defendant resisted such attack, using no more force than was necessary to repel it.

(b) Although the jury may believe and find from the evidence that the plaintiff received injuries in consequence of falling upon the floor, or upon some object upon the floor, yet, if you find for the plaintiff, he is entitled to compensation for injuries thus received to the same extent as if they had been inflicted directly by the blow of the defendant.

(c) If the jury find for the plaintiff, they will assess his damages at such sum as will compensate him for all injuries, if any, he has sustained; also, for all bodily pain and mental anguish he has suffered, if any; the whole not to exceed the amount of ten thousand dollars, as claimed in the petition.

(d) The jury are instructed that, while the keeping of a store for the sale of merchandise is an invitation to the public to visit such store, it is an invitation to visit it only for proper purposes in connection with the business there being carried on, and all persons going to such places are required to conduct themselves in a proper, orderly and quiet manner, free from profane and loud and boisterous language; and where a person, having entered a store, engages in such loud, boisterous and profane language, or invites a quarrel, he becomes a trespasser upon the premises, and may be requested to withdraw by the proprietor or any person in his employ. And, in case such trespasser refuses to withdraw, he may be forcibly removed; using such force as may be necessary for that purpose.

(e) I further instruct you that if you find from the evidence that the witness N. entered the defendant's store and engaged in loud, angry and profane language, then the defendant had the right to direct him to stop the use of such language and quit his premises; and if you find from the evidence that, upon being requested to stop the use of improper language or to withdraw, the witness N. made a move to strike the defendant with his hand, then such movement was an assault upon the defendant, although the blow may have been intercepted or failed to reach the defendant.

(f) And, if you find that N. did make such an offer to strike the defendant, then in that case the defendant, being upon his own premises, was not obliged to retreat, but he had the right then and there to repel such attack with a blow, using all the force necessary

no color of title to it, and the owner comes and demands it, and the trespasser refuses to give it up, the owner may use force sufficient to enable him to retake his property," citing 1 Addison on Torts (Wood's Ed.) 545; Cooley on Torts, 3d Ed., 291-293.

to cause N. to cease his assault. The party assaulted in such a case is not required to use any close or nice calculation to determine just exactly the degree of force necessary, not overstepping such measurement a hair's breadth on either side, but he may use all such force as a reasonable, prudent man, under like circumstances of excitement and danger, would use to repel such an assault.

(g) And in case you find the defendant was justified in striking the plaintiff, N., then in that case he is not to be charged with any unusual or unlikely result which may have in fact followed the blow given in this particular case. By this is meant that if you should find that by reason of any peculiar physical condition existing at the time in N., which was not apparent to W., and would not be apparent to persons of ordinary observing disposition, the blow struck in this case carried with it consequences and results that were unusual and beyond those which are ordinarily to be expected from such a blow, then in that case the mere unusual severity of the consequences will not make that liability to damages in the defendant which would not have been such liability had the blow been followed by only such consequences as might reasonably have been expected.

(h) The law permits every man to defend himself when wantonly assailed, and in such defense it requires of him only such prudence as is common among ordinarily careful men, and that, if unusual and not to be expected results follow from a defense so made, the original wrongdoer and aggressor must suffer for them, and not he who only engaged in his own defense, and could not reasonably have foreseen such unusual results.

(i) If a person willfully trespasses upon the premises of another, and while so trespassing assaults the owner thereof, and the owner, while defending his person from such assault, inflicts an injury upon the party thus making such assault, the party thus injured cannot recover damages for the injury so received.[28]

28—The series of nine instructions for plaintiff and defendant given above is taken from Norris v. Whyte, 158 Mo. 20, 57 S. W. 1037 (1039), where the defense was that defendant justifiably attempted to put plaintiff out of his store, on account of defendant's misconduct, using no more force than was reasonably necessary.

The court said that these "very clear and exhaustive instructions" are fully supported by former decisions, citing Morgan v. Durfee, 69 Mo. 469, 33 Am. Rep. 508; State v. Reed, 154 Mo. 121, 55 S. W. 278, 282.

See Assault, general heading Criminal.

CHAPTER XXXI.

ATTACHMENT.

See Erroneous Instructions, same chapter head, Vol. III.

§ 535. Right of Attaching Creditor—Fraud. The court instructs you that an attaching creditor can acquire through his attachment no higher or better right to the property or assets attached than the defendant in the attachment had when the attachment was issued, unless the said creditor can show fraud or collusion between the said defendant in attachment in this case, to injure or impair the rights of said creditor.[1]

§ 536. Fraudulent Intent Must Be Proven. The fraud, as alleged, is one of the substantial charges made by the plaintiff in the affi-

1—Mathews v. Reinhardt, 149 Ill. 635 (643), 37 N. E. 85. "Although this instruction is vigorously assailed, we are unable to see any material error in it, especially as applied to the evidence in this case. The instruction merely announces the principle that, an attaching creditor acquires no better right to the property attached than the defendant in the attachment had at the time of the levy, unless fraud or collusion between him and his vendee is shown, but no attempt is made to define what would constitute such fraud and collusion as would render the sale void as against creditors. It in no way contravenes the rule that notice to the vendee of the fraudulent intent of the vendor makes him participant of the fraud. But even admitting that the instruction is technically defective in failing to recognize the rule, that notice to the vendee of the fraudulent intent of his vendor, would, of itself, without any active participation on his part in the fraud, render the sale void as to creditors, we find no evidence, and none is pointed out, which, in our judgment, tends to charge the plaintiff with notice of such fraudulent intent. It is true that plaintiff knew that P. had failed in business and became insolvent, but that fact alone did not import a fraudulent intent, nor was it sufficient to put the plaintiff on inquiry for such intent. A party who has become insolvent, so long as he retains dominion over his property, has a right to dispose of it, and an intending purchaser, unless something more than the mere fact of insolvency is brought to his attention, may purchase and obtain a good title, even as against creditors."

davit, and it must be proved by a preponderance of the evidence, as the law never presumes fraud without evidence tending to show it. And, although you may believe, from the evidence, that the defendant was then about to assign and dispose of portions of his property, still, unless the plaintiff has proved, by a preponderance of the evidence, the fraudulent intent, as charged in the affidavit, you should find the issues for the defendant.[2]

§ 537. **About to Depart from State—Burden of Proof.** The court instructs the jury that the burden of proof is upon the plaintiff to establish, affirmatively, that the defendant was about to depart from the state, with the intention of removing his effects therefrom, at the date of the affidavit in question; and that a failure to establish, by a preponderance of proof, either the intention to remove from the state, or his intention to remove his property from the state, will entitle the defendant to a verdict.[3]

§ 538. **Temporary Absence from the State Not Sufficient Ground.** (a) The court charges the jury that the temporary absence of a debtor from the state, though he does not inform his creditors, does not authorize an inference prejudicial to his integrity, nor authorize an attachment against him or his property.

(b) The court charges the jury that the absence of a debtor from his home does not subject his property to attachment upon the allegation that he absconds or secretes himself, and his neglect to inform a creditor of his intended absence does not alone authorize the latter to resort to the extraordinary remedy of attachment.

(c) If L. left his usual place of business and abode with the intention of again returning, and without any fraudulent intent, then his absence was not that of absconding in the meaning of the law.[4]

§ 539. **Debtor About Fraudulently to Dispose of Property—Burden of Proof.** (a) The jury are instructed that, upon the issue

2—Lord v. Defendorf, 54 Wis. 496, 11 N. W. 903.

3—Hawkins v. Albright, 70 Ill. 87; Coston v. Paige, 9 Ohio St. 397; Hermann v. Amedu, 30 La. Ann. 393.

4—Vandiver & Co. v. Waller, 143 Ala. 411, 39 So. 136. In comment the court said that the "evidence showed that the defendant in attachment was absent from Camden, the town in which he resided and did business, for nearly two weeks before the attachment was sued out. There was evidence which tended to show that he was absent in good faith seeking funds with which to pay his debts, and there was evidence tending to show to the contrary. It must be conceded as true that the temporary absence of a debtor from the state, though he does not inform his creditors, does not per se authorize the creditor to resort to the writ of attachment to collect his debt. Pitts v. Burroughs, 6 Ala. 733. While the charge is argumentative, and in one respect abstract, in that there was no evidence showing that defendant in attachment left the state, this will not make the giving of the charge reversible error. We do not think the charge precluded the jury from consideration of the evidence tending to show that the defendant in attachment was absent in the sense that he had absconded. There was no error in giving charge 2. The defendant could have corrected any misleading tendency in that respect by an explanatory charge."

formed upon the affidavit in attachment, the only question is whether at the time the attachment writ was sued out, the defendant was about fraudulently to assign, conceal or otherwise dispose of his property so as to hinder or delay his creditors in the collection of their debt.

(b) Anyone who alleges that certain acts were done in bad faith or for a dishonest purpose, takes upon himself the burden of showing by specific acts and circumstances tending to prove fraud, that such acts were done in bad faith; and in this case, the jury would not be warranted in finding a verdict for the plaintiff upon the issue of the truth of the affidavit for attachment, unless they believed, from the evidence, that the defendant, at the time the attachment writ was sued out, was about fraudulently to assign, conceal or otherwise dispose of his property so as to hinder or delay his creditors.[5]

§ 540. Attachment by Collusion between Creditor and Insolvent Debtor—Alabama Code. If the jury believe that the attachment was sued out as the result of an agreement or understanding with the attaching creditor by which he was to sue out the same and have it levied upon the property of the debtor and thereby acquire a prior lien upon the property of the latter over other creditors, then the attachment was void and your verdict will be for the plaintiffs.[6]

§ 541. Duty of Officer to Release Levy as to Goods Sold by Debtor. (a) The court further instructs you that, although you may believe from the evidence that the marshal, or his deputy who executed the writ, did not have notice of the sale by said C. to the plaintiffs before or at the time of said levy, yet if you find from the evidence that he afterwards received notice of such sale, that then it was his duty to have separated the goods belonging to the plaintiffs from the other stock, if it could have been done, and released the levy on them. And if you believe that he had such notice, and

5—Deuber Watch Case Co. v. Young, 155 Ill. 226 (227), aff'g 54 Ill. App. 383, 40 N. E. 582.

6—Butler v. Feeder, 130 Ala. 604, 31 So. 799 (801). The court said: "It is well settled 'that a writ of attachment issued collusively between creditor and insolvent debtor, for the purpose of giving preference, and with intent to effect a fraudulent transfer of the debtor's property to the plaintiff in attachment, through the machinery of the attachment process, is a void suit or proceeding within the meaning of section 2156 (1735) of the Code.' Cartwright v. Bamberger, 90 Ala. 405 (407), 8 So. 264; Comer v. Heidelbach, 109 Ala. 220; 19 So. 719; Gassenheimer v. Kellogg, 121 Ala. 109, 26 So. 29; Collier v. Shoe Co., 122 Ala. 320, 25 So. 191; Rice v. Eiseman, 122 Ala. 343, 25 So. 214; First Nat. Bank of Montgomery v. Acme White Lead & Color Co., 123 Ala. 344, 26 So. 354; Stern v. Butler, 123 Ala. 606, 26 So. 359, 82 Am. St. Rep. 146. In order to effect a collusive attachment, such as the statute avoids, it is not now required that a contesting creditor shall show that the defendant in attachment was insolvent or in failing circumstances. The statute makes no such condition. There was no error in giving the charge requested by the plaintiff."

refused to separate the goods, and release the levy on plaintiffs' part of same, you should find for the plaintiffs.

(b) Although you may believe from the evidence that the goods purchased by plaintiffs were not so marked or designated that the marshal could have distinguished them by inspection or examination, yet if you believe that the marshal had notice of the sale to plaintiffs of the goods sued for prior to or at the time of the levy, and could have found out which were plaintiffs' goods after such notice, then it was the duty of the marshal to have separated plaintiffs' goods, from the remainder of the stock, and not levied upon them; and if you find from the evidence that he had such notice, and refused to separate plaintiffs' goods, but levied upon them, your verdict should be for plaintiffs.[7]

§ 542. Conveyance to Hinder and Delay—Retraction. That the only issue for the jury to try is the one formed upon the affidavit in attachment and the plea in abatement thereof, and that is, whether or not, at the time the attachment writ was sued out, the defendant was about to fraudulently assign, conceal, or otherwise dispose of his property, so as to hinder or delay his creditors in the collection of their debts.[8]

§ 543. Sale by Debtor Void Without Change of Possession. You are instructed that as against the attaching creditors of X., the plaintiff could not acquire a good title to the goods in question simply by buying them of X. and paying him therefor the purchase

7—Orr & Lindsley Shoe Co. v. Frankenthal, 4 Ind. Ter. 368, 69 S. W. 906 (907). "Upon this point the evidence tended to show that the agent of the plaintiffs claimed the entire stock of goods: not only the goods mentioned in the bill of sale in evidence, but all the goods in the store. And the jury might believe one or the other of these contradictory claims. If the plaintiffs' agents were claiming the whole of the stock of goods, and as such agent, on the part of plaintiffs, he had a bill of sale of only part of said stock, this would be such a fraud upon the officer that there could be no liability whatever in his seizure under his attachment writ of the whole of the stock of goods. And if this contention was maintained after the service of the writ, and were all of the goods in the possession of the officer, it would still be a fraud upon such officer, and there would be no liability. But if the plaintiffs, having a valid bill of sale of a part of the goods seized upon under the writ, notified the officer of such bill of sale, and of the plaintiffs' ownership of certain of the goods so seized, there is no doubt that the officer, upon such notification as to such goods, would be a trespasser, and liable to the plaintiffs for the value thereof; and the jury ought to have been properly instructed as to these points, citing Buck v. Colbath, 70 U. S. 334, 18 L. Ed. 257; 1 Wat. Tresp. 474; Murfree Sher. § 270a; Drake, Attachm. (6th Ed.) 196-198 inclusive; Harris v. Tenney, 85 Tex. 254, 20 S. W. 82, 34 Am. St. Rep. 796."

8—Miller v. McNair, 65 Wis. 452, 27 N. W. 333; Davison v. Hackett, 49 Wis. 186, 5 N. W. 1459. McCrosky v. Leach, 63 Ill. 61, holds that a failing debtor's conveyance of his real estate to his wife which is never recorded and is with his wife's consent destroyed before the attachment is sued out does not constitute a conveyance to hinder or delay his creditors, although the effect thereof if it had been recorded would have been to hinder and delay his creditors. The case was tried without a jury.

price agreed upon, but there must also be a change of possession of the goods, and without a change of possession, the sale would, on that account, be void as against attaching creditors of X.[9]

§ 544. Conveyance by Partner of Non-Partnership Property Not Chargeable to Firm. (a) Although the jury may believe from the evidence that G. M. or D. M. conveyed his interest in certain lands to his wife for consideration of love and affection, which interest in lands was his individual property, and not in any way connected with partnership assets or partnership business, that such act did not authorize an attachment against said partnership, and can be no defense in this case.

(b) Although the jury may believe from the evidence that G. M. or D. M. conveyed his interest in certain lands to his wife for consideration of love and affection, which interest in lands was his individual property, and not in any way connected with partnership assets or partnership business, that such act did not authorize a writ of attachment to be levied upon the partnership assets of E. & M. Bros., and that the same is no defense to the suit.[10]

§ 545. Attachment—Garnishment of Bank—General and Special Deposit. The court instructs the jury that if they find, from the evidence, that L. F. had a deposit account with the defendant bank at the time of the service of the garnishee summons upon it in this cause, and that L. F. at that time had on deposit with the defendant a sum of money equal to or in excess of the amount shown by the evidence to be due on the judgment in favor of the B. Mfg. Co. and against said L. F., upon which this proceeding is brought, then the jury should find the issues for the plaintiff, and assess the plaintiff's damages at the amount shown by the evidence to be due upon said judgment, unless you believe, from the evidence, that said moneys were held by the bank as a special deposit for the payment of the debts of a special enterprise in which L. F. was engaged, and not for payment to L. F. or his orders generally.[11]

§ 546. Right of Debtor to Sell or Give Away If He Has Less Than Amount Exempted by Law. The court charges the jury that in law, when a party has less than $1,000 of property, such party can sell at any price, or give away his property, and his creditors cannot complain.[12]

9—Morris v. Coombs, 109 Ill. App. 176 (178). Replevin against sheriff for stock of goods levied on under attachment writs, which plaintiff claimed had been sold to him by the debtor. The court said: "The instruction correctly stated the law. Rapp v. Rush, 96 Ill. App. 536. The change in the character of possession should be indicated by such outward, open, actual and visible signs as can be seen and known to the public, or persons dealing with the property. Second Nat. Bank v. Gilbert, 174 Ill. 85, 51 N. E. 584, 66 Am. St. Rep. 306."

10—Painter et al. v. Munn et al., 117 Ala. 322, 23 So. 83 (85), 67 Am. St. Rep. 170, action for wrongful attachment.

11—Bank of Commerce v. Franklin, for the use, etc., 88 Ill. App. 198 (206).

12—Vandiver & Co. v. Waller, 143 Ala. 411, 39 So. 136.

CHAPTER XXXII.

ATTORNEYS.

See Erroneous Instructions, same chapter head, Vol. III.

§ 547. Degree of Care and Skill Required of Attorney. The court instructs the jury that an attorney must be held to undertake to use a reasonable degree of care and skill, and to possess to a reasonable extent the knowledge requisite to a proper performance of the duties of his profession, and, if injury results to the client as a proximate consequence of the lack of such knowledge or skill, or from the failure to exercise it, the client may recover damages to the extent of the injury sustained; but we are all human beings, and attorneys are not responsible for errors and mistakes that they make. If an attorney is fairly capacitated to discharge the duties ordinarily incumbent upon one of his profession, and acts with a proper degree of attention and with reasonable care and to the best of his skill, he will not be responsible. He must, of course, act towards his client with integrity and honesty.[1]

§ 548. Advice of Counsel as a Defense—Must Be of Licensed Attorney. The jury are further instructed that when the advice of attorney or counsel is invoked as a defense, it must be shown that the counsel or attorney selected and advised with was a regular licensed attorney and counselor reputable in character, and so considered in the community, competent to give legal advice on all matters pertaining to law. It is not sufficient as a defense that the person advising the transaction held himself out as an attorney at law, and was believed to be such by the party consulting him, but it must be shown that the attorney counseled and advised with was a regular licensed attorney and counselor and of reputable character.[2]

1—Malone v. Gerth, 100 Wis. 166, 75 N. W. 972, 69 Am. St. Rep. 906, 41 L. R. A. 563.

2—To justify under advice of an attorney, the latter must be licensed. Davis v. Baker, 88 Ill. App. 251 (254). The advice referred to in the instruction was in

§ 549. **Judge of Probate Court Prohibited from Acting as Attorney in Cases Pending Before Him.** (a) The jury are instructed that the law prohibits the judge of the Probate Court from acting as an attorney and counselor at law in all matters pending in his own court, and that this prohibition is not confined merely to suit pending in the Probate Court, but extends likewise to all suits pending in other courts, which are so connected with an estate pending in said Probate Court as to require of said Probate Court official and judicial action with respect to the same, and when a suit is pending in the Circuit Court to set aside a last will and testament of a person whose estate is pending for administration in the Probate Court, the judge of said Probate Court is prohibited by law from soliciting or receiving from any person interested in said estate any money, property or other valuable thing, as compensation for inducing the executor of said estate to make a settlement or compromise of such will suit, and this is so, notwithstanding his motives were intended to accomplish what should be for the best interests of all parties concerned, without any wrong intention whatever in so doing.[3]

§ 550. **Recovery for Legal Services.** The court instructs you in this case that, if you believe from the evidence that the defendant performed for and rendered to the plaintiff legal services, and that there was an agreement between them either before or after they were performed as to the price or compensation for such services, then the defendant has a right to recover for such services at the agreed price.[4]

§ 551. **Not Entitled to Compensation When Contract Is Broken.** You are instructed that when a client employs an attorney for a specific action, that is an entire contract; and if you find that the attorney broke the contract himself, or acted in such a manner as

reference to suing out a writ of attachment.

3—Evans v. Funk, 151 Ill. 650, 38 N. E. 230. "It seems to us the very statement of the claim and proposition suggests the only possible answer that can be given to it. Nor can it be material whether he was an attorney in the case as a peacemaker or otherwise, or whether his motives were good or bad, if he was there in his own interest, and for hire, both the statute and principles of public policy alike forbid that he should again act as judge in his own court where such cause or any of the matters involved, directly or indirectly. . . . We think this prohibition against appellant's right to act as an attorney in the will contest is clearly within the spirit, if not the letter of the statute. But even without any statute on the subject, the right of anyone to act as both judge and attorney at different times in the same cause, or in collateral questions arising out of the same cause of action, is so clearly incompatible with an impartial, pure and unfettered administration of public justice in the courts, and so contrary to the principles of public policy, that such claim can not be allowed under any pretense whatever. There was no error, therefore, in the instruction which informed the jury that appellant could not lawfully engage in that will controversy, and had no right to demand or receive the money for his services."

4—Bingham v. Spruill, 97 Ill. App. 374.

to make the relation of attorney and client no longer possible, you must find that the attorney is not entitled to any compensation.[5]

§ 552. **Evidence Given by Attorneys as to Value of Services Rendered.** (a) The court instructs you that the evidence given by attorneys as to the value of the plaintiff's services does not preclude you from exercising your own knowledge upon the value of such services. It is your duty to weigh the testimony of the attorneys as to the value of plaintiff's services, if any, by reference to their nature, the time occupied in their performance, and other attending circumstances, and you may apply to it your own experience and knowledge, if any, of the character of such services.[6]

(b) The jury are instructed that M., without conflict, appears to have had the management of defendant's business in all the litigation referred to in this case, for which the plaintiff seeks to recover; and that the bargain, either under plaintiff's or defendant's version, was made by and between plaintiff and M.; and that, if the jury believe from M.'s testimony that some time after plaintiff came to Detroit in the interest of M. in the murder case, and that this was after all the services were performed by plaintiff, and that M. called at the office of B., and there requested the plaintiff to show his books, and make a settlement, and that plaintiff refused to do so, claiming that it was unnecessary, as he (plaintiff) had looked his books over, and found that he was indebted to defendant, having received enough moneys to pay him for all his services, then and in such case the plaintiff cannot recover, and the verdict of the jury must be for defendant.

(c) Plaintiff has introduced testimony tending to show the value of his services, and, if he relies upon value, rather than upon his express contract as alleged, he must stand by the actual value of his services, and must accept, under the law, such amounts as those services were reasonably worth; and if from all the testimony in this case the jury believe the amounts which he has received, and of which he acknowledges credits, were sufficient in amount to compensate him for his services, then and in such case he cannot recover, and the verdict of the jury must be for the defendant.[7]

5—Cahill v. Baird, 138 Cal. 691, 72 Pac. 342.

6—Brownrigg v. Massengale, 97 Mo. App. 190, 70 S. W. 1103. The court said in comment that "the testimony of experts is only advisory, and the jury is not required to surrender their judgment, or to give a controlling influence to the opinion of expert witnesses, but may exercise an independent judgment from their own knowledge and experience, is well settled law here and elsewhere. Cosgrove v. Leonard, 134 Mo. 419, 33 S. W. 777, 35 S. W. 1137; State v. Witten, 100 Mo. 525, 13 S. W. 871; City of Kansas v. Street, 36 Mo. App. 666; W. U. Tel. Co. v. Guernsey & Scudder Elec. Light Co., 46 Mo. App. 120; Head v. Hargrave, 105 U. S. 45, 26 L. Ed. 1028; Randall v. Packard, 142 N. Y. 47, 36 N. E. 823; Rog. Exp. Test., par. 204."

7—Babbitt v. Bumpus, 73 Mich. 331, 41 N. W. 417-19, 16 Am. St. Rep. 585. "We think these requests state the law applicable to the facts in this case in terse and succinct language, and we can see no

§ 553. **Interest from Date of Demand.** If your verdict is for the plaintiff, you will find for him in such sum as, considering all the circumstances in evidence, you believe is the fair and reasonable value of his services, together with interest thereon at the rate of —— per cent. from the date of any demand you may believe was made of defendant by plaintiff for payment.[8]

reason why they should not have been given; and their substance was really not given in the general charge, or, if it was, it was in a manner that might be easily misunderstood by the jury. A party has the right to have the law of his case go to the jury in its plainest simplest form; and if it is properly embodied in a request in that form, prepared by counsel, and furnished to the court, it ought to be thus given, and the request should not be ignored by the court. We have had occasion to allude to this subject before, and when the court declines to give such requests it must appear that the substance of them has been as well given by the court in its own language, or the omission will be error."

8—Brownrigg v. Massengale, 97 Mo. App. 190, 70 S. W. 1103 (1105).

CHAPTER XXXIII.

BAILMENTS AND WAREHOUSEMEN.

See Erroneous Instructions, same chapter head, Vol. III.

BAILMENTS.

§ 554. Bailee Cannot Deny Bailor's Title. The court instructs the jury, that if they believe, from the evidence, that the defendant borrowed the property in controversy from the plaintiff for a temporary use or purpose, with the understanding that he would return the property when demanded, and that afterwards, and before the commencement of this suit, the plaintiff made such demand, and that, upon such demand, the defendant refused to deliver up the possession of the property, then the jury should find the right of property in the plaintiff, and the defendant guilty of a wrongful detention of the same.[1]

§ 555. Hired Horse—Degree of Care Required of Bailee. (a) If the jury find from the evidence that the plaintiff hired his mare to the defendants for the purpose of being used by them in pulling street-cars on and upon the street railroad of the city of F. W., the plaintiff thereby engaged and bound himself that the mare was reasonably fit and suitable for such purposes and such uses. If, therefore, you find that the mare so hired was injured while in the use of the defendants in pulling their street-cars, without their fault, and through the nervousness and fretfulness of said mare, or be-

1—Simpson v. Wrenn, 50 Ill. 222. The above instruction was approved, even though it was disclosed by the evidence that the bailee actually owned the property which had previously been stolen from him.

cause of her diseased condition at the time the plaintiff hired her to the defendants, or because of her unfitness to pull said street-cars, then you should find for the defendants.

(b) Although it is true that, by hiring his mare to the defendants for such use on the street cars, the plaintiff impliedly engaged that she was reasonably fit for that purpose, this gave the defendants no right to use her after it became manifest to them that by reason of her nervousness or fretfulness or diseased condition she was not fit for such work. They had no right to abuse her. If her board devolved upon them, it was their duty to supply her with plentiful food and water, and at the proper time. It was their duty also not to require her to do more work than it was manifest she could perform without injury, and if, during such use, it was plainly evident to the defendant's employes that she was exhausted, overheated or suffering by reason of disease, and her continued use was dangerous to her health and life, it was their duty then to abstain from further use of her without obtaining the plaintiff's consent to the same; and if, without so doing, they negligently persisted in such use, and by reason of the same she was so injured that she died, the defendants are liable.[2]

§ 556. Trial of a Horse with Option of Purchase is a Bailment—Degree of Care Required. (a) If the jury believe from the evidence in this case that the plaintiff gave the defendant an option to purchase the horse in question if he liked it, and if you further believe from the evidence that the defendant received such horse from said plaintiff for the purpose of making such trial, then such transaction constituted a bailment and not a sale, and so imposed on the defendant only the duty of ordinary care in keeping and returning the horse.

(b) The court further instructs the jury, that if they believe from the evidence that the defendant, and his agent or agents, exercised ordinary care in the use of such horse while on such trial (ordinary care meaning such care as an ordinarily prudent man would give to his own horse under such circumstances) and if the death of the horse resulted, then the defendant is not liable for the value of the horse while in his control for the purpose of making such trial.[3]

§ 557. Liability of Bailee for Money Converted to His Own Use. The court instructs you, that if you believe from the preponderance of the evidence that defendants . . . agreed with the plaintiff that they, the defendants, would jointly settle up and pay off the

2—Bass et al. v. Cantor, 123 Ind. 444, 24 N. E. 147.

3—Small v. Roberts, 43 Ill. App. 577 (578). The court said: "It is very clear that both paragraphs constitute but one instruction. The omission of the conjunction 'and' between the two gives rise to a trifling ambiguity which disappears when the words are all considered."

debts of the estate of ———— out of the proceeds that they might receive from the farm in question, and out of moneys, notes and personal property of plaintiff, and if you further believe from the preponderance of the evidence that defendant received money, notes and personal property of and belonging to the plaintiff, for that purpose, and if you further believe from a preponderance of the evidence that defendants converted any of said money, notes and personal property to their own use, and did not use and apply the same in settling up the estate of ————, or in paying off the debts of said estate, that then the plaintiff would be entitled to recover the value of said notes or property thus converted, if the evidence shows that the same was converted.[4]

§ 558. **Degree of Care Required in a Bailment for the Sole Benefit of the Bailor.** The jury are instructed that, if you believe, from a preponderance of the evidence, that the defendants held the bonds of the plaintiff exclusively for the benefit of the plaintiff, then the only obligation resting upon them was to exercise reasonable and ordinary care over the same. What constitutes such reasonable and ordinary care is a question of fact for the jury to determine from all the evidence in the case. It will vary with the nature, value and situation of the property. The person who holds or has the charge of the property of another under such circumstances is required to exercise the care usually and generally deemed necessary in the community for the security of a similar property under like circumstances, but nothing more. It is for you to say what the evidence is, what it proves, tends to prove or fails to prove, and the court has no right to, and must not be understood to, intimate any opinion as to any question of fact. If, from all the evidence, you find and believe that the defendants did not exercise over the bonds of the plaintiff reasonable and ordinary care, but were guilty of gross negligence in their keeping, and that by reason thereof the bonds were lost to the plaintiff, then you will find the defendants guilty.[5]

WAREHOUSEMEN.

§ 559. **Defining Warehousemen.** I instruct you that a warehouseman is one who receives into a warehouse for storage, goods, in consideration of hire or money paid for that service.[6]

§ 560. **Equal Duty Towards all Patrons.** The jury are instructed that the defendant was not bound to single out plaintiff's cotton and save it before all other cotton in the warehouse of defendant. It was the duty of the defendant to use such diligence and make

4—Ellis v. Petty, 51 Ill. App. 636 (639).

5—Gray et al. v. Merriam, 148 Ill. 179, 35 N. E. 810, 32 L. R. A. 769, 39 Am. St. Rep. 172.

6—Foster v. Pac. C. L., 30 Wash. 515, 71 Pac. 48 (49).

such efforts to save all the cotton in its care and custody as would under all the circumstances be reasonable, or as would have been made under all the circumstances by men of ordinary prudence. If, therefore, you believe from the evidence that the defendant company used ordinary care or diligence in its efforts to save the plaintiff's cotton from damage by flood, your verdict must be for the defendant.[7]

§ 561. **Negligence not Presumed from Mere Fact of Loss of Goods —Burden of Proof.** (a) I instruct you that negligence will not be presumed from the mere fact of the loss of the oats, but the fact of negligence must be shown by plaintiff by a fair preponderance of the evidence under the rules and in accordance with the instructions that I have heretofore given you.[8]

(b) The burden of proving any negligence on the part of the defendant—that is to say, the burden of proving that defendant did not exercise ordinary care as explained—rests upon the plaintiff, and, unless the plaintiff has established by a preponderance or greater weight of evidence that the defendant was negligent as explained, your verdict must be for the defendant.[9]

§ 562. **Ordinary Care Required—Definition of.** (a) The court instructs the jury that the defendant company is not liable to plaintiff for any damage to his cotton unless caused by the negligence of the defendant company as explained. The court further instructs you that the defendant company is not liable for any loss or damage to plaintiff's cotton caused by reason of the flood or high water, unless, under all the circumstances shown in evidence, you find by the exercise of ordinary care the defendant could have foreseen the danger by flood, and by the exercise of ordinary care and diligence could have prevented or avoided the damage to plaintiff's cotton.

(b) Ordinary care, foresight and diligence mean such foresight and diligence as a person of ordinary sense or prudence engaged in the same or similar business might reasonably be expected to use under the same or similar circumstances.[10]

(c) The court instructs the jury that if you believe, from the evidence, that the plaintiff stored wheat in defendant's mill for safe-

7—Prince & Co. v. St. L. C. C. Co., 112 Mo. App. 49, 86 S. W. 873 (877).

8—Foster v. Pac. C. L., 30 Wash. 515, 71 Pac. 48 (49). "It would seem that the nature of the accident may raise the presumption of negligence under some circumstances. See Holt Ice & Cold St. Co. v. Arthur Jordan Co., 25 Ind. App. 314, 57 N. E. 575; Davis v. Job Printing Co., 70 Minn. 95, 72 N. W. 808; Russell Mfg. Co. v. New Haven Steamboat Co., 50 N. Y. 121. In Kaiser v. Latimer, 40 App. Div. 149, 57 N. Y. Supp. 833, the principle of the case is very well asserted in the syllabus: "The negligence of a warehouseman will be presumed where the goods were destroyed by the collapse, from no external violence, of the building in which he stored them.' "

9—Prince & Co. v. St. L. C. C. Co., 112 Mo. App. 49, 86 S. W. 873 (877).

10—Prince & Co. v. St. L. C. C. Co., supra.

keeping (and without reward), then the defendant is bound only to use ordinary care in keeping and caring for said wheat.[11]

§ 563. **Duty to Remove Goods When Flood Threatens.** (a) The court instructs the jury that between May and June the defendant company was a public warehouseman engaged in the business of storing cotton for hire, and, as such, it was the duty of its officers and employes to exercise such reasonable care and foresight, and to make such diligent and energetic efforts to prevent damage or injury to the cotton of plaintiff which was stored with it, as men of ordinary prudence and foresight would have exercised in caring for their own property of the same kind in the same situation, and under the same or similar circumstances and conditions, whether requested by plaintiff to do so or not. The court further instructs you that if you find from the evidence that on and after May the said warehouse No. 1 of defendant was known by its officers to be in continually increasing danger of being flooded or overflowed by the waters of the Mississippi River, then the degree of care, foresight, and diligence required of said officers and employes of defendant in protecting said cotton from said flood, or in removing it to a place of safety, increased in proportion as the danger to said cotton increased; and if you believe and find from the evidence that said officers and employes of defendant, or any of them, failed at any time between May and June to exercise such a degree of care, foresight, and diligence in protecting said cotton from the said flood, or in removing it to a place of safety, as men of ordinary prudence and foresight would have exercised in protecting their own property of the same kind in the same situation and under the same or similar circumstances and conditions, and that by reason of said failure plaintiff's cotton was damaged, then your verdict should be for plaintiff.

(b) The court instructs the jury that though they may find from the evidence that the damage to plaintiff's cotton was caused by the high water or flood mentioned in the evidence, yet if they believe from the evidence that the cotton of plaintiff might have been saved from any damage by the exercise of ordinary care by the defendant or its employes, then the defendant is liable for the damage done or the loss suffered by the plaintiff, and the jury are instructed that the degree of care or effort required of the defendant was such as could be reasonably expected of persons of ordinary common sense and prudence engaged in the same or similar business as defendant, and under the same or similar circumstances, as shown by the evidence.[12]

11—Mayer v. Gersbacher, 207 Ill. 296 (303), 69 N. E. 789. The court said: "There was evidence to sustain the conclusion that the appellee's intestate was but a bailee without reward, and in such case he was only held to reasonable diligence in caring for the wheat, and the instruction accurately stated the law."

12—Prince & Co. v. St. L. C. C. Co., supra. For further instruc-

§ 564. Warehouse Receipts, Assignable—Tender of—Equivalent to Delivery. The jury are instructed that by the laws of this State, warehouse receipts are assignable by indorsement and the delivery of a receipt properly indorsed is equivalent to a delivery of the grain called for by the receipt and a tender or offer of a warehouse receipt properly indorsed is equivalent to a tender of the grain called for by the receipt.[13]

§ 565. Warehouse Receipts—Constructive Possession. If the jury believe that the warehouse receipts were issued by the warehouseman to the sellers, and by the sellers delivered to the bank upon the payment of the checks of D. & Co. for the purchase money of the cotton, and that neither the receipts nor the cotton had ever been in the possession of D. & Co., but were held by the bank to secure the payment of the purchase money advanced by the bank to buy the cotton in controversy, and that said purchase money had not been paid to the bank, then they should find for the claimant.[14]

§ 566. Where Storage Due is Greater Than Value of Goods. The court instructs the jury that if you believe, from the evidence, that the balance of the storage due was more than the value of the goods at the time of the sale, then the jury should find for the defendant.[15]

tions on this subject, see chapters on Negligence.

13—Gregory v. Wendall, 40 Mich. 432; Davis v. Russell, 52 Cal. 611; Van Zile on Bailments, 2d Ed., 145.

14—Longino v. Delta Bank, 75 Miss. 407, 24 So. 901. "The cotton was at no time in the possession, actual or constructive, of D. It was in the actual possession of the owner until delivered by him to the compress and storage company, and thereafter in its possession. The receipt gave the constructive possession to the owner until delivered by the owner to the bank, and thenceforward it was in the bank. The cotton or the receipt was at no time in the possession of D. It (the cotton) was not acquired or used by him in his business. Durr v. Hervey, 44 Ark. 301, 51 Am. Rep. 594; Benj. Sales, § 174; Mechem Sales, § 1507."

15—Gerold v. Guttle, 106 App. 630 (634). The court said: "Even if it should be conceded that the attempted sale of the goods by appellants to themselves amounted to a conversion of property (which we have carefully avoided holding) the refusal of the court to give the instruction was error for which judgment should be reversed."

For instructions on liens by warehousemen, see chapter on Mortgages and Liens.

CHAPTER XXXIV.

BANKS AND BANKING.

See Erroneous Instructions, same chapter head, Vol. III.

§ 567. Deposit in Bank to Credit of Another—Return to Depositor. The court instructs the jury that, when one person deposits money in a bank to the credit of another, the bank has no right to return it to the person who made the deposit, without the consent of such other.[1]

§ 568. Receipt of Deposit Knowing it to be the Money of Third Person. The jury are instructed that, if, from a preponderance of evidence whether direct or circumstantial, they believe the defendants at the time they received the money mentioned in the evidence from V. B. had notice or knowledge that such money was not the money of said V. B., but was the money of the plaintiff bank, then such notice or knowledge would make the receipt of said money an act of actual bad faith by the defendants.[2]

§ 569. Appropriation of a Balance Due a Depositor to Payment of a Note Owing to the Bank. The jury are instructed, that in order for the holder of a check to maintain an action thereon against the bank on which it is drawn, he must show that when it was pre-

1—Drumm-Flato Com. Co. v. Gerlach Bank, 107 Mo. 426, 81 S. W. 503.

2—Merchants' Loan & Trust Co. v. Lamson, 90 Ill. App. 18 (23). The court said: "This was but an abstract declaration of law, and, as such, was no doubt correct. It was, perhaps, sufficiently timely. Citing Yore v. Transfer Co., 147 Mo. 687, 49 S. W. 855."

sented for payment the bank owed the drawer a sufficient sum to pay it; and that, therefore, in this case, if they find from the evidence that on June 2, ——, the drawer had a credit balance in its account as a depositor with the defendant of ———, or thereabouts, but that the defendant on that day or thereafter, prior to the presentation of the checks in suit to the defendant for payment, appropriated the said balance as a payment on account of a note of said drawer to the defendant, payable on demand, in consequence of which appropriation there were no funds of said drawer in the hands of the defendant for payment of checks when said check was presented for payment, then the law is that the defendant had the right to make such appropriation, and moreover had the right to make it without first demanding payment of the note, and the verdict should be for the defendant, and the form of the verdict should be, "We, the jury, find the issues for the defendant."[3]

§ 570. **Appropriation of Money Received Illegally and by Forgery to Payment of Other Sums Embezzled.** If the jury believe, from the evidence, that X, claiming to act as the agent of defendant, obtained money from the plaintiffs upon the sale or pledge of the shares of stock in the Y company mentioned in the evidence with endorsements of said defendant upon their back, which endorsements had been previously forged by said X, and that said X used portions of such moneys so obtained to replace moneys previously embezzled by him from said defendant, and the balance of such moneys or some portion thereof for the use and benefit of said Y in his legitimate business, then the jury are instructed that said defendant is liable to said plaintiffs in this action for so much of said moneys as were used by said X to replace money previously embezzled by him from said defendants, also for so much of the balance thereof as was used by said X for the use and benefit of said defendant in his legitimate business.[4]

§ 571. **Authority of Cashier May Be Inferred by Acquiescence in His Acts for Long Time.** The authority of a cashier may be inferred

3—First Nat'l B. of Chi. v. Kelsay, 54 Ill. App. 660. "It is to be assumed that acts done in the ordinary course of business in a bank, by an officer of a bank, are within his authority and therefore what the vice president commenced on the 2d, was then an appropriation of the credit balance, as it might turn out to be in fact, to the payment of the note."

4—Slaughter v Fay, 80 Ill. App. 105 (122). The court said, in reversing above case for refusal to give this instruction: "There was testimony tending to show, and which it is contended by appellants conclusively established, that a portion of the money collected upon the checks given by appellants was paid and used for appellee's benefit and to pay his debts. If it be true that a portion of that money was so used, then appellants were entitled to recover the same from appellee, because it was so used, without regard to the question of whether it came rightfully into the bank to the credit of appellee. See the O'Beirne case, 121 Ill. 25, 7 N. E. 85. The jury should have been instructed upon this point, and should have been permitted to determine what the facts are in that regard."

from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of a corporation as represented by its board of directors. When during a series of years and in numerous business transactions he has been permitted without objection, and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between his bank and those who in good faith deal with it, upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operation. His authority is to be implied from the acquiescence of the directors in permitting an officer, during a series of years, to pursue a particular course of conduct, and this acquiescence is derived from their actual knowledge, or from what should have been their knowledge of the conduct, of the course of business of the officers.[5]

§ 572. **Repudiation of Agreement—Diligence.** If the jury believe that the defendant went within a reasonable time, and on his first opportunity, he saw the vice-president of the bank, and told him that this slip was not the agreement the bank made with him, and told him the transaction, then this was a repudiation of the paper, and the defendant's keeping the paper after this would make no difference.[6]

CRIMINAL.

§ 573. **Fraud Inferred—Deposit of Bonds of Exaggerated Value Among the Bank's Assets—Intent to Defraud Defined.** (a) The rule of law in regard to intent is that intent to defraud is to be inferred from willfully and knowingly doing that which is illegal, and which, in its necessary consequences and results, must injure another. The intent may be presumed from the doing of the wrongful or fraudulent or illegal act, and in this case, if you find that the defendant placed that which was worthless or of little value among the assets of the bank at a greatly exaggerated value and had that exaggerated value placed to his own personal account upon the books of the bank, from such finding of fact you must necessarily infer that the intent with which he did that act was to injure or defraud the bank, but this inference or presumption is not necessarily conclusive. There may be other evidence which may satisfy the jury that there was no such intent, but such an inference or presump-

5—Rankin v. Chase Nat'l Bank, 188 U. S. 557 (563), 23 S. Ct. 372.

6—Bank of Guntersville v. Webb, 108 Ala. 132, 19 So. 14 (15-17). "Without the words 'on his first opportunity,' this charge, given for the defendants, might have been objectionable as referring to the jury the question of what was 'reasonable time,' but, with the added words, 'and on his first opportunity,' that vice is taken away, and altogether, the charge is free from error."

tion throws the burden of proof upon the defendant, and the evidence upon him in rebuttal to do away with that presumption of guilty intent must be sufficiently strong to satisfy you beyond a reasonable doubt that there was no such guilty intent in such transaction.

(b) The court instructs the jury that there is testimony to show that the defendant at the time he was thus depositing the bonds, gave a guarantee that the bonds were good, and that he would guarantee the payment of principal and interest. You can take that into consideration, and such guarantee can only be considered as determining the value of those bonds at that time and the intent of the party in such transaction. * * * As I say again, the only difficult question for you to determine is the intent of the accused. The question of the intent is to be determined by the facts and circumstances and the surroundings at the time of the transaction; but the law presumes that every party who in any way attempts anything by any guarantee or anything of that kind which is dependent upon future successful operations, takes the risk of the success, and that if a person commits an offense with the intent of temporarily injuring or defrauding another party or a banking institution, although it may be his intent at the time to finally recompense or prevent any injury resulting from such act, he is not protected by such intent to finally correct the temporary wrong deed; or, in this case, if you are satisfied that at the time he placed those bonds there he knew that they were worthless or of a very small value and had a large value charged to the bank and placed to his account; if he did that with the intent, for the time being, to injure the bank and take a wrongful advantage of the credit of the bank, no matter if at that time he had an intent to in the future remedy any injury that might come to the bank, it would not protect him in your finding or from your finding, what the intent was at that time.[7]

§ 574. **Failure of the Bank as Prima Facie Evidence of Knowledge on Part of the Defendants—Burden of Proof.** The court instructs the jury that although by the statute the failure of the bank is made prima facie evidence of knowledge on the part of the defendant that the same was in failing circumstances, yet the burden of proving the state's case is not really changed. The law enables the state to make a prima facie case by proof of the assenting to the creation of said indebtedness and the reception of the money into the bank; but the defendant can show the condition of the bank and the circumstances attending the failure, and any facts tending to exonerate him from criminal liability, and then on the whole case, the burden still rests on the state to establish the defendant's guilt beyond a reasonable doubt. The presumption of innocence with which the defendant is clothed, and never shifts, rests with him through-

7—Agnew v. United States, 165 U. S. 36 (49-56), 17 S. Ct. 235.

out the case, notwithstanding a prima facie case may have been made out by the state.[8]

§ 575. **Series of Instructions on the Question Whether or Not a Check Was Deposited for Collection.** (a) If it was the intent and understanding of the W. bank and the accused at the time the latter deposited the check in question with the former, that the bank should forward the same in the usual course by and through its correspondents in St. L. for payment, and that in so doing it and its correspondents should act only as the agents of the accused for that purpose, then the final payment by the C. company at St. L. of the check to the correspondents on the W. bank, would amount in law to a payment in St. L. as charged in the sixth count, of the amount of the check to the accused. If on the contrary it was the understanding and intent of the W. bank and the accused at the time the latter deposited the check in question with the former that the bank should become the purchaser of the check, and should thereafter be the absolute owner thereof, and not act as just indicated, as the agent of the accused in the collection of the check, then the payment at St. L. by the C. company would amount in law to a payment to the W. bank and not to the accused. In the latter event no crime would have been committed by the accused in this district, by reason of the check referred to in the sixth count of the indictment.

(b) In order to find the accused guilty on the sixth count, you must find from the evidence, by the same measure of proof as is required in all criminal cases, that the check referred to in the sixth count was deposited by the accused in the W. bank for collection, and that the bank was to act in collecting the same, as the agent of the accused, and not as the owner of the check in question.

(c) In determining this issue, you are at liberty to and should consider all the evidence adduced; the actual transaction as it occurred at the R. bank where the check was deposited, the check itself and all its endorsements, the rights and privileges which were immediately accorded the accused upon making the deposit, the actual conduct and purpose of the R. bank in forwarding the check to St. L. for payment, the customary conduct and usage of that bank, and all banks in W. at the time so far as shown by the proof. And if from all these facts and all other facts disclosed by the proof you find that the check in question was in fact deposited by

8—State v. Darragh, 152 Mo. 522, 54 S. W. 226 (229). In comment the court said: "We think the court committed error in refusing to give above instruction. This instruction is a clear and concise presentation of the principle by which the jury should have been governed in arriving at their verdict under the statute governing the case as expounded in State v. Buck, 120 Mo. 492, 25 S. W. 573, in which the constitutionality of the statute was questioned on account of the new principle of evidence which it introduced and which is not common to ordinary criminal cases."

the accused, with the intent and knowledge on his part, as well as on the part of the bank itself, that it should be forwarded to St. L. for collection for account of the accused, the bank and its correspondents acting as agents for the accused to make such collection, you should find that when the same was actually paid to the last indorser on the check at St. L. by the trust company upon which it was drawn, it was in contemplation of law paid to the accused himself.

(d) If on the contrary you find from the evidence that the accused and the R. bank, at the time of the deposit of the check in question, understood and intended that the bank should become the purchaser of the check and be its absolute owner, then the subsequent forwarding of it to St. L for payment was the act of the bank itself, and the final payment of the check by the trust company at St. L. was a payment not to the accused, but to the bank, and if such is the fact your verdict on the sixth count must be not guilty.[9]

§ 576. Series on Wrongfully Accepting Deposits by Bank in Failing Circumstances—Knowledge of Such Circumstances by Officer of Bank. (a) The court instructs the jury that these instructions contain the law of this case. It is the duty of the jury to apply the proven facts of the case to the law here given, and find their verdict accordingly.

(b) The court instructs the jury that if you shall believe from the evidence that the defendant, at the county of Jackson and state of Missouri, at any time within three years next before———, was the president of the ————, and that the same was a corporation, and doing business as a banking institution in said county and state, did then and there unlawfully and feloniously assent to the taking and receiving on deposit in said banking institution the money of ———— to the amount of —— dollars or more, and that said banking institution was then and there in failing circumstances, and that defendant was then and there the president of said banking institution, doing business as such, and that the defendant had knowledge at the time that such deposit was received that said banking institution was in failing circumstances, you will find the defendant guilty, and assess the punishment by imprisonment in the penitentiary for any time not less than two years and not more than five years. "Feloniously" as used in these instructions means wickedly and against the admonition of the law; unlawfully.

(c) If the jury believe from the evidence that on ———— the witness, ————, did deposit in the ———— Bank, a banking institution doing business in the state of Missouri in the county of Jackson, state aforesaid, ———— dollars or any part thereof of the value of ———— dollars or more, lawful money of the United States, of the money and property of the witness—and shall

9—Burton v. United States, 196 U. S. 283 (300), 25 S. Ct. 243.

further believe from the evidence that the said deposit was not taken and received by the defendant himself, but was taken and received by some other person, but that such other person was then and there in the employ of the said ———— Bank, and acting under the direction and control of the defendant in said employment, and that such other person had general power and authority from the defendant to receive deposits of money in to said bank, and that said bank was then and there in failing circumstances, and the defendant had knowledge that said bank was then and there in failing circumstances, they will find the defendant guilty as charged.

(d) The court instructs the jury that a banking institution is in failing circumstances when it is unable to meet the demands of its depositors in the usual and ordinary course of business, and this is true even though you shall believe that there was at the time a stringency in the money market.

(e) The court instructs the jury that the failure of the banking institution in question is prima facie evidence of knowledge on the part of its president that the same was in failing circumstances ————. The court instructs the jury that prima facie evidence is such that it raises such a degree of probability in its favor that it must prevail unless it be rebutted or the contrary proved.

(f) The jury are instructed that in considering the condition of the bank on the ————, you will not take into account the ———— dollars of capital stock as a liability. The court instructs the jury that the indictment of itself, is no evidence of guilt.

(g) The court instructs the jury that in determining the condition of the ———— Bank on ————, you should consider the reasonable market value of the assets of the bank on hand as compared to its liabilities on that day. All consideration of the condition of the bank is confined to the ————, but you may consider any evidence that may be before you showing its condition immediately before that day, if there is any such, to aid you in determining its condition on that day.

(h) In determining the guilt or innocence of the defendant, you may take into consideration all the facts and circumstances before you.

(i) The court instructs the jury that it is not, of itself, a crime for the president of a bank to borrow money from the bank of which he is president; and you can consider the fact that the defendant borrowed money from the bank in question, if you find he was president of the bank, and did borrow money from the bank in determining the condition of the bank, the ————, and for no other purpose.

(j) If you believe that the money was deposited in the name of ———— and ————, if you find it was so deposited, and that

C. V. had possession and care of the same, then, for the purpose of this case, said money was the money of C. V.

(k) In determining the question as to the condition of the bank on the ————, you will consider the assets and their reasonable market value on that day, and without any reference to any indorsement of any of the notes made after the ————.

(l) The court instructs the jury that it is no offense for an officer of a bank to assent to the receipt of a deposit by such bank when the same is in failing circumstances, if at the time of receiving such deposit the officer did not at the time know it was in failing circumstances; but in taking into consideration the question whether or not the bank in question was in failing circumstances on ————, and as to whether or not the defendant had knowledge on that day of its condition, you may consider all the facts and circumstances in evidence before you.

(m) The court instructs the jury that before they can convict the defendant they must be satisfied of his guilt beyond a reasonable doubt. Such doubt to authorize an acquittal upon reasonable doubt alone, must be a substantial doubt of the defendant's guilt with a view to all the evidence in the case, and not a mere possibility of the defendant's innocence.

(n) The court instructs the jury that the law presumes the innocence, and not the guilt of the defendant; and this presumption of innocence attends the defendant throughout the trial, and at the end entitles the defendant to an acquittal, unless the evidence in the case when taken as a whole, satisfies you of defendant's guilt beyond a reasonable doubt as defined in these instructions.

(o) The court instructs the jury that the defendant is a competent witness in this case, and you must consider his testimony in arriving at your verdict; but in determining what weight and credibility you will give to his testimony in making up your verdict, you may take into consideration, as affecting his credibility, his interest in the result of the case, and that he is the accused party on trial, testifying in his own behalf.

(p) If verbal statements of the defendant have been proven in the case, you may take them into consideration with all the other facts and circumstances proven. What the proof may show you, if anything, that the defendant has said against himself, the law presumes to be true, because against himself; but anything you may believe from the evidence that defendant said in his own behalf, you are not obliged to believe, but you may treat the same as true or false, just as you believe it true or false, when considered with a view to all the other facts and circumstances in the case.

(q) The jury are the sole judges of the credibility of the witnesses and the weight and value to be given to their testimony. In determining as to the credit you will give to a witness, and the weight

and value you will attach to a witness's testimony, you should take into consideration the conduct of the witness upon the stand; the interest of the witness, if any, in the result of the trial; the motives of the witness in testifying; the witness's relation to, or feeling for or against the defendant or the alleged injured party; the probability or improbability of the witness's statements; the opportunity the witness had to observe and to be informed as to matters respecting which such witness gives testimony; and the inclination of witness to speak truthfully or otherwise as to matters within the knowledge of such witness. All these matters being taken into account, with all the other facts and circumstances given in evidence, it is your province to give to each witness such credit, and the testimony of each witness such value and weight as you deem proper.

(r) In determining as to the guilt or innocence of the defendant you should take into account the testimony in relation to his character for honesty, integrity and veracity, and you should give to such testimony such weight as you deem proper; but if from all the evidence before you, you are satisfied beyond reasonable doubt, as defined in these instructions, that the defendant is guilty, then his previous good character, if shown, cannot excuse, justify, palliate or mitigate the offense, and you cannot acquit him merely because you may believe he has been a person of good repute.

(s) The court instructs the jury that in determining the question of whether or not the ———— Bank was in failing circumstances on————, you should consider the liabilities of the bank, and the reasonable market value of the assets of the bank on that day, regardless of any change, if any, or additional security, if any which may have been given, of any, since that day. If you shall find from the evidence that any part of the assets of said bank have been proven to have a market value, then you should give such assets such intrinsic value as may have been shown by the evidence in the case, and if there be any of said assets, to wit, stocks, bonds or negotiable paper, that have not, in your opinion, from the evidence been shown to have a market value nor an intrinsic value, then such assets are presumed to be worth their face value. This will have no application to such assets as may have been shown by the evidence to have no value at all, provided there is such evidence as to any of the assets of said bank.

(t) The court instructs the jury that under ———— of the by-laws of the ———— Bank and under the laws of the state governing savings banks, the board of directors of the ———— Bank had a right to require 90 days' notice of the withdrawal of time deposits.[10]

10—State v. Darragh, 152 Mo. 522, 54 S. W. 226 (227). In approving and commenting upon this series of instructions the court said: "The instruction No. 5 (b) is a literal transcript of the seventeenth instruction given in the Satley Case, and was expressly ap-

proved in that case, the court saying: 'This instruction is a rescript of the statute, and was expressly approved after an exhaustive examination and discussion in State v. Buck, 120 Mo. 479, 25 S. W. 573.' Instruction No. 16 (p) is the same as instruction numbered 7 in the Sattley Case, in which this court in that case said: 'Instruction No. 7 has been approved so often in this state that we must decline to enter upon its defense. State v. Carlisle, 57 Mo. 102; State v. Brown, 104 Mo. 365, 16 S. W. 406; State v. Wisdom, 119 Mo. 539, 24 S. W. 1047. By this instruction the jury are required to take all the statements of the defendant, whether for or against himself, into consideration with all the other facts and circumstances proven.' And while the criticism to which the last paragraph is subjected by the learned counsel for the defendant in the present case may be well enough from the standpoint of the critical lawyer, yet when the instruction as a whole is looked at from the standpoint of the practical juror, for whose mind it is intended, and which has not been trained to the nice distinctions between disputable and indisputable presumptions it loses all its force. This instruction has proven to be a good workable instruction for many years, is not calculated to mislead a jury, and continues to command our approval. The same may be said of instruction No. 18 (r) in regard to evidence of good character, which is criticized in like manner, but which in substance has frequently been approved by this court. State v. Jones, 78 Mo. 278; State v. Kilgore, 70 Mo. 546; State v. McMurphy, 52 Mo. 251; State v. Alexander, 66 Mo. 148, loc. cit. 160. It is not subject to the criticism on the instruction in the last case."

CHAPTER XXXV.

BOUNDARIES.

See Erroneous Instructions, same chapter head, Vol. III.

§ 577. Boundaries a Question of Fact for the Jury and Not for the Surveyor. The jury are instructed that the question in this case is not how would an accurate survey locate these lots in question, but how did the original survey and stakes locate them. The only purpose of the evidence of the surveyors, who have made the recent surveys, is to enable the jury to locate the original boundaries, if possible, and not for the purpose of determining where they ought to have been, or where they would have been by an accurate survey. The original starting points and boundaries are questions of fact for the jury to find from the evidence, not only the evidence of the surveyors, but all the other evidence in the case bearing upon these points.[1]

§ 578. Inclosure by Natural Objects. If the jury believe, from the evidence, that a slough on the east side of the premises in question served substantially for the purpose of a fence, and, in connection with other fences, made an inclosure of said premises, the slough should be considered a fence, and the field an inclosed field, for the purpose of this trial.[2]

§ 579. Rules of Location—Order to Be Adopted—Visible Monuments Control Courses and Distances. (a) The jury are instructed that in determining the boundary line between two tracts of land, if there are visible monuments fixed on the ground and referred to in the deed as marking the boundary, and these can be ascertained, they

1—Diehl v. Zanger, 39 Mich. 601; Stewart v. Carleton, 31 Mich. 270; Cronin v. Gore, 38 Mich. 381.

2—Brumagim v. Bradshaw, 39 Cal. 24.

will control the courses and distances, if the line indicated by the monuments differs from that called for by the courses and distances given in the deed.[3]

(b) The court instructs the jury that in locating lands covered by a deed, where there are no natural boundaries, such as a creek, a river, mounds, etc., called for in the description contained in the deed, the next highest rule is the artificial marks made or adopted by the surveyor who ran the line at the time the deed was executed, and not any older marks which may be shown to exist on a different line.

(c) The court instructs you that while it is true that, in locating the lands covered by a deed, the following rules are usually adopted in the order named: First, natural boundaries, such as creeks, rivers, mounds, etc.; second, artificial marks, which means the artificial marks made on the trees by the surveyor who ran the lines when the deed was made, or such old marks as were adopted then; third, adjacent boundaries; and fourth, courses and distances—yet it is also true the superior of these rules must, and do, yield to the inferior when it appears from the deed itself that the inferior rule will locate the land so as to carry out the intention of the grantor.

(d) The court instructs you that in locating lines, a course laid down on a plat is less to be relied upon than adjacent boundaries and marked lines, especially if the grantor and the grantee agree that the course marked on the plat is an error, and that the true line is the adjacent boundary called for on the plat.[4]

§ 580. **Jury Not Bound by Particular Rule of Location.** (a) The court instructs you that in locating land covered by a deed, in order to find out what land the grantor conveyed, the jury are not bound by any particular rule of location. The rules of location which usually govern must yield to the intention of the grantor as ascertained from the description of the land contained in the deed, and not from any parol evidence which might tend to contradict or vary its terms.

(b) Even if it has been shown that C. P. B. did at one time have title to the land in dispute, still the jury cannot locate the deed from B. to defendant so as to cover this land, if they find that the line as actually run when the deed was made did not cover this identical land.[5]

§ 581. **Object of Rules of Location.** The court instructs you that the object of rules of location is to enable a jury to find where the surveyor went when he ran his lines, so that, in locating the deed from B. to the defendant, J., the jury should try to ascertain where the surveyor went, and, if he did not run his lines so as to cover and

3—Watson v. Jones, 85 Penn. St. 117; Daniels v. People, 21 Ill. 439.

4—Connor v. Johnson, 59 S. C. 115, 37 S. E. 240.

5—Connor v. Johnson, supra.

take in the identical land in dispute, then the deed from B to the defendant, if it was made in accordance with such survey, does not include such land, and the defendant cannot hold it by virtue of such deed.[6]

§ 582. Boundary on Watercourse. (a) The rule of law is that where two persons own land adjoining, on the same side of the stream or river, and are both bounded by the river, the presumption of law is that each owns to the middle of the stream in front of his own land, and if the shore line dividing their lands does not strike the river at right angles to the stream the boundary line from the shore to the middle of the river is determined by extending the division line at the point where it strikes the shore perpendicularly to the general course of the stream opposite that point, that is, running the line from the point where it strikes the shore to the nearest point in the center of the river.[7]

(b) The court instructs you, as a matter of law, that where a stream of water, such as a river or creek, is the boundary line between two adjoining owners, and the stream alters its channel from year to year, by a slow, gradual and almost imperceptible wear upon one side and accretion on the other, then the boundary shifts with the channel; but if the stream changes its course visibly and violently, making what is known as a cut-off in high water, then the boundary does not change with the stream, but it adheres to the original channel.[8]

§ 583. Whether Surveyed Line or Agreed Line Is the Correct Boundary. (a) If you believe, from the evidence, that the line claimed by plaintiffs as surveyed by W. B. A. is the correct land line, then you will find for the plaintiffs, unless you further find that the land line as claimed by defendant was agreed upon as the land line by B. & R., and upon this latter proposition the defendants are required to produce the preponderance of the evidence before you can find for them on the alleged agreement.[9]

(b) If you believe, from the evidence, that the fence in question, claimed by the defendant to be the line fence between his land and that of the plaintiff, does not stand upon the true survey line between said lands; and if you further believe, from the evidence, that the fence was placed where it now is by agreement of the parties, merely for the convenience of working the land, and not for the purpose of marking the boundaries according to title, then neither party would be bound by the existence of the fence, as establishing either an agreed boundary line or adverse possession to the lands in controversy.[10]

6—Connor v. Johnson, supra.

7—Clark v. Campaw, 19 Mich. 325; Bay City G. L. Co. v. Industrial, etc., 28 Mich. 182.

8—Collins v. State, 3 Tex. App. 323.

9—"Held that the words (land line) were synonymous with 'boundary line.' Henderson v. Dennis, 177 Ill. 547 (550), 52 N. E. 426."

10—Soule v. Barlow, 49 Vt. 329.

§ 584. Line Fence Agreed Upon—What to Consider in Determining Boundary. (a) And in determining whether there was such an agreement and establishing of the line, it is competent for you to take into consideration the acts and statements of the parties, the acts done by each, and the fixing and adjustment of fences, and improvements by them, under such alleged agreement, if any such are proved, together with all the other evidence and facts and circumstances proved on the trial.[11]

(b) You are instructed that the fact, if proved, that a line fence was built on the line claimed by the defendant as the agreed line, and that the parties occupied up to the fence for a number of years, would not alone prove that the fence was built upon the true line, or that that line was established by agreement of the parties, or by the persons under whom they hold. In order that that line shall be conclusive upon the parties, the jury must believe, from the evidence, either that the fence was built upon the true line, that the adjoining owners in an honest attempt to fix the dividing line between their lands, agreed upon that line as the boundary line between them, or that the defendant, for twenty years or more, occupied the land in controversy adversely, as explained in these instructions upon that point.[12]

(c) In locating a deed, a jury should take into consideration the number of acres mentioned, the shape of the plat, as well as other parts of the description contained in the deed, and locate the land covered by it so as to conform to that part of the description which the more certainly shows the intention of the grantor.

(d) The court instructs you that if, from the number of acres mentioned, the shape of the plat, as well as other parts of the description, the jury find that a grantor did not convey a piece of land which is in dispute, then the one who claims under such deed has no title to such land, even though such grantor may at one time have owned it.[13]

§ 585. Division Line Agreed Upon Through Mistake—Limitation. (a) The law is that where parties agree upon a division line between their lands, and they occupy up to such line for a period of twenty years, they will be held to the line so established, although the line be not the true line, and was agreed upon by mutual mistake.[14]

(b) The law is that if two adjoining proprietors occupy on the opposite sides, and up to what they both erroneously suppose to be the true dividing line, with no intent on the part of either to claim

11—Cutler v. Callison, 72 Ill. 113; Tamm v. Kellogg, 49 Mo. 118; Smith v. Hamilton, 20 Mich. 433; Terry v. Chandler, 16 N. Y. 354; Joice v. Williams, 26 Mich. 332.

12—Chapman v. Cooks, 41 Mich. 595, 2 N. W. 924.

13—Connor v. Johnson, 59 S. C. 115, 37 S. E. 240.

14—Smith v. McKay, 30 Ohio St. 409; Yutzer v. Thoman, 17 Ohio St. 130; Bader v. Zeise, 44 Wis. 96.

beyond the true line, such possession would not be an adverse possession of the land thus erroneously occupied.[15]

(c) You are instructed, as a matter of law, that where one of two adjoining land owners has possession for over twenty years of a portion of the other's land, by reason of the division fence not being on the line, such possession will not bar a recovery of the land by the true owner, unless the fence was agreed upon as the boundary line, and the possession taken and held in pursuance of such agreement, or unless such possession is adverse to the title of the true owner as explained in these instructions upon that point.[16]

§ 586. **Long Acceptance of a Boundary Line—Adverse Possession.** (a) The court instructs you that the question for your determination in this case is the true location of the division line between the land owned by the plaintiff and the defendant. If you believe and find from the evidence that the old fence now referred to and described by the witnesses is the true location of the division line between the plaintiff's and defendant's land, or was accepted and recognized by those under whom plaintiff and defendant claim, as such division line, or if you find from the evidence that the line run and surveyed by M. is another and different line from the said old fence row, and is the true division line between plaintiff's and defendant's land, but you further find that the plaintiff and those under whom he claims, had and held peaceable and adverse possession of the land claimed by him in this suit, extending to said old fence row, cultivating, using or enjoying the same, for more than ten years next before the date of the entry and trespass, if any, of the defendant on said land, then in either such case you will find for the plaintiff, although you may believe the distance from the S. W. corner of the K— survey, running east with its south boundary line to said old fence row, is more than 950 yards, unless you find for the defendant under the instructions hereinafter given you. If, on the other hand, you believe and find from the evidence that the said line run and surveyed by the said M. is another and different line from said old fence row, and is the true location of the division line between plaintiff's and defendant's land, or if you find from the evidence that W. C. H., in his lifetime, and the defendant agreed or accepted and recognized the said line run and surveyed by said M. as such division line, and you do not find that the plaintiff and those under whom he claims had and held peaceable and adverse possession of the land in dispute, extending to said old fence row, cultivating, using or enjoying the same, for more than ten years next before the entry and trespass, if any, of defendant on said land, then in either such case you will find for the defendant.[17]

15—Houx v. Batteen, 68 Mo. 84.
16—McNamara v. Seaton, 82 Ill. 468.
17—Rountree v. Haynes, 73 S. W. 435 (436), — Tex. Civ. App. —.

(b) The court instructs the jury that, if you find from the evidence that the plaintiff and the defendant and his grantors, G. and H., recognized a certain line between them as the true line for a period of 10 years, then you will find for the defendant, regardless of where the true line may be between them.[18]

§ 587. **Field Notes to Govern, When.** The court instructs you that should you find a discrepancy in the calls for artificial objects, then you are to be governed by the call or calls that most thoroughly indicate to your minds the intention borne upon the face of the field notes.[19]

§ 588. **Entry upon Land Must Be Justified by Deed Covering Identical Boundaries.** (a) The court instructs you that where a defendant undertakes to justify his entry upon land which has been shown to be in possession of a plaintiff under color of title, by introducing in evidence a deed which he claims covers the land in dispute, then he is bound by the description of such land as given in such deed, and, if the description of the land in this deed does not include and take in the identical land in dispute, it is not sufficient to justify such entry.

(b) The court instructs you that where a defendant's only claim of title in a case like this to land in dispute is a deed from a former owner, such deed is not sufficient to justify his entry upon land in possession of another under color of title, unless such deed actually covers and includes the identical land in dispute.

(c) The court instructs you that it is the duty of the jury, in locating land covered by a deed, to try and ascertain what land the grantor conveyed, and in doing this they must look to the deed itself, and locate the land by that description in the deed which more certainly shows the intention of the grantor.

(d) The court instructs you that if, in locating the deed from B. to the defendant, it appears that the lines as actually surveyed and run when the land was conveyed by B. did not go to the line of ——, and did not cover the land in dispute, then such deed will not be sufficient to justify an entry by a defendant upon land as against one who is in possession of such land under color of title.

(e) The court instructs you that color of title sufficient to justify a defendant for cutting and removing timber and trees from land in possession of plaintiff under color of title means that the defendant must have a deed or plat, or something which defines the extent of the claim, and which covers and includes the identical land in dispute. A mere claim that such deed or plat, etc., covers and includes the identical land is not sufficient, but the evidence must satisfy the

18—Williams v. Shepardson et al., 4 Neb. 608, (unof.) 95 N. W. 827 (831).

19—Matkins v. State, — Tex. Crim. App. —, 62 S. W. 911.

jury that such deed or plat, etc., does cover the identical land; otherwise, it is not sufficient to justify an entry on it.[20]

§ 589. **Grantor Who Adopts Plat Warrants Land as Described Therein—Plat Forms Part of Deed.** (a) When a grantor adopts a plat attached to a deed as the true description of the land sold and conveyed, he thereby only warrants the land sold as described therein, and as run and delineated by the surveyor who surveyed the land at the time the deed and plat was made.

(b) Where a deed refers to a plat for a fuller description, the plat forms a part of the deed; and, if the plat calls for adjacent land as a boundary, such boundary is as much a part of the plat as the courses laid down on the plat. If such a plat calls for adjacent land as a boundary, the new plat cannot cross the lines of the older grant, but the lines of the older grant must first be located; and the lines of the plat must be made to conform to the lines of the older grant, even if the courses and distances on the new plat must be corrected so as to conform to the courses and distances called for by the older grant. This is not remodeling the deed or plat, but is making it conform to the true boundary called for by the plat. For adjacent boundaries called for on the plat control the courses and distances, also called for on the plat, and where they conflict there is an error on the plat, and the adjacent boundary is the true line.

(c) The court instructs you that in locating land covered by a deed, where it describes the land as containing a certain definite number of acres, without the addition of the words "more or less," and gives as boundaries some of the adjacent lands, and refers to a plat attached to the deed for a fuller description of the land conveyed, then, as a rule, the land conveyed is the land marked and delineated by the surveyor who run the lines when the deed was made, and such deed only covers the land so run, marked and described.[21]

20—Connor v. Johnson, 59 S. C. 115, 37 S. E. 240.

21—Connor v. Johnson, supra.

CHAPTER XXXVI.

BROKERS.

See Erroneous Instructions, same chapter head, Vol. III.

§ 590. Broker's License as a Requisite to Recovery of Commissions. The court declares the law to be that it would not be warranted in finding the issues in this case for the defendant because it might believe from the evidence that at the time of the transactions in evidence the plaintiff was not a licensed real estate agent or broker, and that at such time the city of ———— had an ordinance imposing a penalty on any one acting as such real estate broker or agent in such city without first procuring a license.[1]

1—Tooker v. Duckworth, 107 Mo. 231, 80 S. W. 963 (964). The court said: "There are authorities in other states to the contrary, but they have not been followed in this state, where it has been uniformly

§ 591. Broker Must Be the Efficient Cause of the Deal. The court instructs the jury that, if they believe, from the evidence, that the defendant placed his property in the hands of the plaintiff for sale at a stipulated price, and the plaintiff introduced the defendant to X. and that X. made a proposition to exchange property in P. for defendant's property, which was declined by the defendant, and that negotiations between X. and the defendant were then ended and definitely abandoned by the parties, and that the defendant through the efforts of X. took in exchange for his land land in T. belonging to W. and that W. took property in P. belonging to —— in exchange for the Texas land, the fact that the deed was made from the defendant to X. would not entitle the plaintiff to recover, and you should find for the defendant, unless you further believe the plaintiff was the efficient cause of the deal.[2]

§ 592. Broker Must Bring About a Consummation of the Sale. (a) The court instructs the jury that if you believe, from the evidence, that the defendant placed the property in question in the hands of the plaintiffs for sale, and further that the plaintiffs commenced negotiations with a party who subsequently purchased the property, still you will find for the defendant, unless you also believe, from the evidence in this case, that the plaintiffs actually brought about a consummation of the sale or were prevented from so doing by the fraud, procurement or misconduct or fault on the part of the defendant.[3]

(b) The jury are instructed that the plaintiff's cause of action in this case is a claim made by them as brokers for compensation by way of commissions upon a sale of certain property situated in the city of C. known as the A. Block, made by the defendant to McC. in the latter part of ————, and that to entitle them to recover such, or any, compensation on account of said sale, the jury must believe, from the evidence in the case, that the plaintiffs were employed by the defendant in and about the business of making said sale, and that their services were instrumental in accomplishing it.

held that one party to a contract is not required to overlook the morals of the other, or to refuse to work for him, or to sell him goods, because he may suspect or know that the fruits of his labor or the goods are intended to be used for an immoral purpose. Kerwin & Co. v. Doran, 29 Mo. App. loc. cit. 406; Michael v. Bacon, 49 Mo. 474, 8 Am. Rep. 138; Howell v. Stewart, 54 Mo. 400. To invalidate such contracts it must be shown that both parties to the contract participated in the immoral or illegal purpose. Cockrell v. Thompson, 85 Mo. 510. For a like reason we think the failure of a real estate agent or a merchant to take out a license as required by an ordinance or statute does not avoid his contracts for services rendered or goods sold, unless it is shown that both parties to such contract agreed beforehand that the ordinance or the statute (as the case might be) should be violated, or that they conspired together to evade the law. Nothing of this kind was shown in the case at bar, and we think the court erred in refusing the declaration of law asked by the plaintiff."

2—Stocks v. Scott, 89 Ill. App. 615. See also Porter v. Day, 44 Ill. App. 256.

3—Day v. Porter, 161 Ill. 235 (238), affg. 60 Ill. App. 386, 43 N. E. 1073.

A promise by the defendant to pay the plaintiffs for services independently rendered by a third person in no way associated with the plaintiffs would be a promise without consideration, upon which no action could be maintained by the plaintiffs.

(c) If the jury believe, from the evidence, that upon their own request and solicitations, the plaintiffs were authorized by the defendant to offer his property known as the A. Block to McC. for the sum of $———, and upon no other terms, and that they offered the said property to the said McC. at that price, which offer was declined by said McC., and that fact was reported by the plaintiffs to the defendant, and no authority was given by the defendant to the plaintiffs to offer said property to said McC., or any other person, at any less or different price, then and in that case the jury are instructed that the defendant was fully justified in regarding and treating the authority given by him to the plaintiffs as ended, and the plaintiffs under such circumstances would be entitled to no compensation for the time and labor expended by them in their endeavor to make sale of said property to said McC. And the fact that the defendant subsequently and through another broker, and wholly without the interference or participation of the said plaintiffs, sold the same property to the said McC. for a less sum than $———, if the jury believe from the evidence that such was the fact, would not in any way revive the relations of the parties or give to the plaintiffs any right to commissions or other compensation on account of such sale.

(d) If the jury believe, from the evidence, that the defendant in ————, through D., a real estate broker, offered the property in question to McC. for the sum of $———, which offer was refused, and subsequently in October or November of the same year through the plaintiffs as brokers, who were advised of the previous offer, offered the same property to the said McC. for $———, which offer was also refused, and that thereafter said D. alone, as broker, at the instance of said McC., opened up new negotiations with said McC. for the sale of said property at a less price than $———, which last negotiations resulted in a sale of said property to said McC., for certain securities nominally amounting to the sum of $———, then the plaintiffs are not entitled to commissions upon said sales, and the jury must find for the defendant.[4]

§ 593. Rendering Actual Services Resulting in a Sale—To Recover Commission the Broker Must be the Procuring Cause. (a) The burden of proof is upon the plaintiff to establish all material allegations of his petition, which, in this case, are that he procured for the defendant a purchaser for her real estate, situate in C., who was able and willing, and who purchased the same.

(b) If you believe, from the evidence, that plaintiff rendered services as alleged in his petition, and defendant was enabled there-

4—These three instructions were approved in Fessenden v. Doane, 89 Ill. App. 229 (233).

by to dispose of her property, the plaintiff would, if you so find, be entitled to recover for his services so rendered; and if you find for the plaintiff you will assess the amount of his recovery at such a sum as you believe from the evidence, he is fairly entitled to receive, not exceeding, however, the sum of ——— dollars, as claimed in his petition.

(c) The jury is instructed that, to entitle a real estate agent to recover commission for the sale or exchange of property, he must procure a buyer ready, able, and willing to take the property upon the terms fixed by the seller.

(d) The jury is instructed that, when a person makes a sale or exchange of property listed with a real estate agent, the agent must show that he was the procuring cause of the sale, in order to recover the commission; in other words, it must be shown that he rendered actual services resulting in a sale or trade, as a consequence thereof.

(e) If you find from the evidence that the defendant made the sale of her C. property without the assistance of the plaintiff, and that plaintiff did not in fact furnish a purchaser for the defendant's property, the verdict will be in favor of the defendant.[5]

§ 594. Bringing the Seller and Buyer Together—Amount of Commission Due Broker when Owner Sells for a Less Sum. (a) The jury are instructed as a matter of law that where an agreement for the sale of property is entered into, the agent is entitled to his recompense if he succeeds in bringing the owner and buyer together, and this, too, where the owner in dealing personally with the buyer agrees to accept a less sum than that mentioned to the agent. In such a case the agent is entitled to recover his commission on the amount accepted by the seller.

(b) The jury are further instructed that if they believe from the evidence that an agreement was entered into between the parties to this suit by which the plaintiff H., as agent for the defendant H., was to sell certain property owned by the defendant and to receive a certain commission in the event of a sale through his instrumentality, and if the jury believe from the evidence in this case that a sale of said property was consummated with the purchaser procured by H. the verdict must be for the plaintiff, even though

5—Hodgman v. Thomas, 37 Neb. 568, 56 N. W. 199. "These instructions given," said the court, "fairly submitted to the jury, as essential, the question whether or not the services of the plaintiff were the inducing cause of the trade effected between the parties to the real estate transaction. The court,having once fairly stated the law upon this head, could not properly be required to reiterate its statement, at the request of the defendant, even though such statement was correct. It is true the defendant requested another instruction, which was that plaintiff was not entitled to recover upon the evidence introduced. It was, perhaps, unnecessary to have mentioned this, as the language employed in the beginning of this opinion sufficiently meets this contention of statement of the result of the evidence. There was no exception taken to the giving of any instruction, and hence the consideration already given the instructions sufficiently covers all the points that can be reviewed in this court."

the defendant accepted a less sum for his property than he had given his agent, unless the jury believe from the evidence that the said contract, if any, had been terminated by H. prior to the sale.[6]

(c) The court instructs the jury that if you believe, from the evidence in this case, that the defendant employed the plaintiff, S., as his agent to negotiate the sale of his, the defendant's, street railroad property, and that the plaintiff undertook such employment and was instrumental in bringing together the buyer and the defendant, then and in that case the plaintiff is entitled, as a matter of law, to recover from the defendant compensation for his services, regardless of the fact that the defendant himself concluded the sale, and at a price less and upon terms different from those at which the plaintiff was authorized to sell.[7]

§ 595. **Right to Compensation for Bringing Parties Together, Although Sale is Concluded by the Owner.** The court instructs the jury that, if you believe, from the evidence in this case, that the defendants employed the plaintiffs as their agents to negotiate a sale of the defendants' land, and the plaintiffs undertook said employment and were instrumental in bringing together the buyer and the defendants, then and in that case the plaintiffs are entitled as a matter of law to recover from defendants compensation for their services, regardless of the fact that the defendants concluded the sale.[8]

§ 596. **Right to Commissions Where the Owner Refuses to Carry Out the Trade.** The court instructs the jury that if they believe, from the evidence, that the plaintiffs were engaged in business as real estate agents or brokers in C., that defendant requested or authorized them to sell or find a purchaser for the property in question at the price of $——— cash, and that the said authority was not limited, and was not revoked, and that pursuant to such request they did find a purchaser able and willing to buy said property on said terms, and that defendant, on being notified that such purchaser had been found and was ready to close the bargain on said terms,

6—Hafner v. Herron, 165 Ill. 242 (249-251), 46 N. E. 211.

7—Henry v. Stewart, 185 Ill. 448, affg. 85 Ill. App. 170, 57 N. E. 190. The court said: "It seems to be insisted by counsel that unless M. was the agent of the plaintiff in negotiating the sale, the plaintiff could not recover. That is not so. If plaintiff as agent for the defendant offered the property to M., and thereby brought about a sale, it is held immaterial whether M. acted for himself, or for himself in connection with others, or for a syndicate." Citing Hafner v. Herron, 165 Ill. 242, 46 N. E. 211.

8—Dean v. Archer, 103 Ill. App. 155 (456). The court says that this "same instruction was given by the trial court in Henry v. Stewart, 85 Ill. App. 170, and was approved by the appellate court. The case was appealed from the appellate to the supreme court, where a direct attack upon this instruction was made by counsel. The court sets out the instruction in full in its opinion, and holds it to be the law. Henry v. Stewart, 185 Ill. 448, 57 N. E. 190. This holding is supported by Wilson v. Mason, 158 Ill. 304, 42 N. E. 134; 49 Am. St. Rep. 162; Hafner v. Herron, 165 Ill. 242, 46 N. E. 211; and other cases in both the appellate and the supreme courts of this state."

refused to carry out the trade, then plaintiffs have earned their commission and are entitled to recover.[9]

§ 597. **Broker's Commission for Finding Purchaser—Aiding Owner to Sell.** (a) If you find from a fair preponderance of the evidence that, at the time described in the complaint, the plaintiffs were real estate brokers and agents, doing a general business in the city of I., and that the defendant employed them to sell for him the real estate described in the complaint, or to find a purchaser for the same, and you further find from a fair preponderance of the evidence that they procured a purchaser acceptable to the defendant, and that he sold said property to the person so obtained for him by the plaintiffs, then your finding should be for the plaintiffs; or if you find, from a fair preponderance of the evidence, the defendant agreed to pay them the sum described in the first paragraph of the complaint for the procuring of a purchaser for said real estate, then your finding should be for the plaintiffs, with interest at the rate of — per cent. per annum from demand thereof.[10]

(b) If the jury believe from the evidence that, after the expiration of the first contract, A. agreed with B., about ————, that if they would write to G. and S., offering the land at a certain price, and that if said G. and S. came down and bought the land said B.

9—Munroe v. Snow et al., 131 Ill. 126 (135), 23 N. E. 401. "The objection urged to the first instruction," said the court, "is that it authorizes the plaintiff to recover without showing that an enforceable sale of the property had been made, or that the contract of sale was completed by a conveyance. Appellant contends that inasmuch as he refused to ratify the contract of sale, and that the purchaser could not have it specifically proved for want of written authority to the plaintiffs to make the sale, he is not bound to pay the plaintiffs anything for their services. We can not lend our sanction to this view of the law. A real estate broker employed to make a sale of land, who finds a purchaser at the price fixed by the owner, who is ready, able and willing to take a conveyance and pay the purchase price, has earned the compensation agreed to be paid him; or, if the compensation is not fixed by the parties, he will be entitled to recover the usual and customary reasonable compensation for the services performed. Thus in McGavoch v. Woodlief, 28 Howard 321, the court said: 'The broker must complete the sale,—that is, he must find a purchaser in a situation ready and willing to complete the purchase on the terms agreed on,—before he is entitled to his commissions. Then he will be entitled to them, though the vendor refuses to go on and perfect the sale.' In Doty v. Miller, 43 Barb. 529, it is said: 'The cases are to the effect that a broker or agent who undertakes the sale of property for another for a certain commission, if he find a purchaser willing to purchase at the price, has earned and can recover his commissions, though the sale never was completed, if the failure to complete the sale was in consequence of a defect in title, and without any fault of the broker or agent.' And so also in Bailey v. Chapman, 41 Mo. 537, it is said: 'A broker employed to make a sale under an agreement for a commission is entitled to pay when he makes the sale according to instructions and in good faith, and the principal cannot relieve himself from liability by a refusal to consummate the sale or by a voluntary act of his own disabling him from performance.' We are entirely content with the views expressed in the foregoing citations of authority and are of opinion that there was no error in giving said instruction."

10—Hammond v. Bookwalter et al., 12 Ind. App. 177, 39 N. E. 872.

should be paid — per cent. commission, and further, that said B. did write said letter, and as a result of it said G. and S. did come down and bought the property from said A. for $——, then the verdict must be for the plaintiffs for $——, with interest from date of sale.[11]

§ 598. **Failure of Broker to Find a Purchaser, or Abandonment of Effort—Sale by Owner.** I instruct you further, gentlemen of the jury, that if you believe from the evidence in this cause that B. was unable to bring a purchaser, ready, able and willing to accept the terms of purchase laid down in his contract with the owner of the property, and if you further believe that his own efforts to procure a purchaser had been abandoned, or if you believe that the broker's authority had been terminated in good faith by the defendant, and that subsequent to such abandonment or termination the defendant itself opened negotiations with the final purchaser of the property, and consummated that purchase on account of its own efforts, or on account of the efforts of persons other than B., that under those circumstances your verdict would have to be for the defendant in this cause.[12]

§ 599. **Customary and Usual Commissions to be Allowed.** (a) You are instructed that it is admitted by the defendant in this case that the customary and usual commissions on sales of the character of the one here in question is two and one-half per cent. And you are instructed that if, under the evidence and the instructions of the court, you find for the plaintiffs, then your verdict should be for two and one-half per cent. on $———.[13]

11—Holland v. Howard et al., 105 Ala. 538, 17 So. 35.

12—Von Tobel v. Stetson & Post M. Co., 32 Wash. 683, 73 Pac. 788 (790). "It is urged that the clause, in the above instruction, 'and you further believe that his own efforts to procure a purchaser had been abandoned,' renders the instruction obnoxious, because it compelled the jury to find not only that the broker had failed to find a purchaser ready, willing and able to take the property, but that the defendant's efforts to find a purchaser had been abandoned, before the owner could sell; while the law is that in either of these events, and not necessarily on the happening of both, the appellant was entitled to a verdict. It may be that, as an abstract proposition of law, the appellant's contention is correct, but it does not necessarily follow that an instruction in the form given by the court must in all cases be incorrect. If the facts of the case be that the broker has a prospective customer, with whom he is negotiating, and the owner, while such negotiations are pending, sells the property to that customer, clearly the owner is liable for the broker's commission, notwithstanding the broker had not found a purchaser ready, able and willing to take the property at the terms on which he held the property for sale. Such were the facts in the case before us, if the respondent's contention be true, and we think there was no error in the charge of the court as given, particularly as the court later on explained the distinction between selling to the broker's customer and to a third person."

13—Munroe v. Snow et al., 131 Ill. 126 (135), 23 N. E. 401. The court said: "There was no error in giving this instruction. No testimony was taken of the value of plaintiff's services, and there was no conflict upon that point. The parties had stipulated what the commissions should be in case of a recovery by plaintiffs. That stipulation as found in the record is: 'It is admitted by the parties that in the absence of an agreement the rate of commissions allowed upon sales of real estate of this

(b) The jury are instructed that if they find the issues in the case for the plaintiff they should allow him the customary charges for such services, to-wit, five per cent. on the first thousand, and two and one-half per cent. on the balance of the purchase price.[14]

(c) You will ascertain from the evidence what amount, if any, the plaintiff was indebted to P. for his services for procuring such loan. This amount you will deduct from the amount of the loan still remaining unpaid, and return a verdict for the plaintiff for the difference.

(d) You will compute interest on the amount you find due the plaintiff, at the rate of — per cent. per annum from the date upon which the plaintiff made demand for the payment of said sum, as shown by the evidence.

(e) The burden of proof is upon the defendant to show by a preponderance of the evidence how much, if anything, was due from L. to P.[15]

(f) If the jury find, from a fair preponderance of the evidence, that the defendant, X, employed the plaintiff, Y, to sell the property in question, without naming Z as a probable purchaser, and that, in pursuance of such employment, Y went to Z and got an offer of $——, which he submitted to said X, and that afterwards the defendant conveyed the property to Z for $———, then, if you so find, your verdict should be for the plaintiff for the customary compensation for making such sales, as shown by the evidence.[16]

§ 600. Agreement as to Broker's Commission May be Inferred from the Conduct and Declarations of the Owner. (a) The court instructs the jury that one is concluded not only by what he says or does, but by the natural and reasonable inference from his declarations or conduct; and the jury will take into consideration the reasonable and usually customary conduct of the party, both plaintiff and defendant, in arriving at whether or not an agreement by notification was made between plaintiff and defendant as to the payment of the commission for the sale of the property.

(b) A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which

size is two and one-half per cent.' The reasonable charge for commissions was not, therefore, a disputed or controverted fact in the case, and the court committed no error in directing the jury to compute plaintiff's damages in accordance with such stipulation if they found the issues for the plaintiff."

14—Sample v. Rand et al., 112 Ia. 616, 84 N. W. 683. The court said: "There was no conflict in the evidence regarding the usual commission for finding purchasers, and that the usual charge was as stated by the trial court. The case was tried on the theory that plaintiff was entitled to full compensation for finding a purchaser or nothing. Under the instruction, there could have been no recovery on the theory now advanced by the defendant. Therefore, if the plaintiff did not show himself entitled to the usual commission for finding a purchaser, he was not entitled to anything. Hence there was no error in the instruction."

15—Kansas Loan & Trust Co. v. Love, — Kan. —, 45 Pac. 953 (955).

16—Sample v. Rand et al., supra.

he can contradict cannot afterwards dispute the fact against a person whom he assisted in misleading or deceiving.

(c) If a man is silent when he ought to speak he is debarred from speaking when, in conscience, he will defeat the rights of those who have acquired rights by his silence.[17]

§ 601. **Terms of Contract Affected by Custom—Payment of Commission on Orders.** You are further instructed that in case you are satisfied by the evidence that, at the time plaintiff was employed by the defendant to sell books in Chicago, there was a general custom among those engaged in the business in which defendant was engaged, and in which plaintiff was employed, to pay commissions only upon such orders taken by them that are actually filled after being approved by the agents of such houses, and that all such houses reserve the right to reject all orders not considered reliable, and that such was the custom of the defendant herein, and you further find that plaintiff had actual knowledge of such custom, or that such custom was so well known among bookmen, and uniformly acted upon, as to warrant the presumption that it was known by both contracting parties, and that they contracted with reference thereto, then you are instructed that the making of a contract by the agent of the defendant at Chicago to pay commissions on all orders taken by an agent, regardless of the fact whether or not said orders are approved by the agent, and books delivered on said orders, would not be within the apparent scope of the agent's authority, and, to be binding upon the principal the agent must have express authority to make the contract, or the principal, with full knowledge of the facts, must by some act of his have ratified the same; and the burden of proof would be upon the plaintiff to establish the express authority of the agent to make such contract, or the ratification by the principal, and, in case he has failed to do so, your verdict should be for the defendant.[18]

§ 602. **Agent Not Allowed to Purchase the Property of His Principal—Must Use Good Faith or Lose Commissions.** The court instructs the jury that an agent ought, as far as possible, to represent his principal; and, to the best of his ability, he should endeavor to successfully accomplish the object of his agency. It is also his duty to keep his principal fully and promptly informed of all the material facts or circumstances which come to his knowledge, and, since he is expected to represent his principal, he cannot have a personal interest adverse to his principal; and if he deals with the subject-matter

17—Howe v. Miller, 23 Ky. App. 1610, 65 S. W. 353 (354). These instructions were refused, but the court says of them, "while they contain correct propositions of law, we are not inclined to hold that the trial court erred in refusing to give them in this case, in view of the fact that the instructions given by the court authorized the jury to consider all that occurred between plaintiff and defendant concerning the sale and purchase in question."

18—Collier v. Gavin, — Neb. —, 95 N. W. 842 (843).

of the agency the profits will, as a general rule, belong to the principal, and not to the agent. In all things he is required to act in entire good faith towards his principal. There are duties which the law imposes upon an agent, without any express stipulations on the subject; and one of these duties of an agent is to keep his principal informed of his acts, and to inform him within a reasonable time of sales made, and to give him a timely notice of all facts and circumstances which may render it necessary for him to take measures for his security. An agent cannot act for his principal and for himself in the same transaction, by being both buyer and seller of property, and has no right to act as the agent for others for the purchase of property without the knowledge or consent of such owner, nor to take any advantage of the confidence which his position inspires to obtain the title in himself. If you find that the defendants were the agents of the plaintiff for the sale of the property mentioned in the petition, and that in making the sale they purposely kept from the plaintiff any of the material facts touching said sale, for the purpose of subserving their own interest, and intended to and did keep the plaintiff in the dark as to such facts until after the said sale was consummated, and deed executed by said plaintiff, then I instruct you that they are not entitled to a commission for selling the same.[19]

§ 603. **Commission Merchant—Ordinary Care in Selling Property Required.** The plaintiff cannot be heard to complain at this time

19—Jansen v. Williams, 36 Neb. 869, 55 N. W. 279, 20 L. R. A. 207. "In Steetnische v. Lamb, 18 Neb. 627 (26 N. W. Rep. 374), is this language: 'The rule is well settled that a party will not be permitted to purchase an interest in property, and hold it for his own benefit, where he has a duty to perform in relation thereto which is inconsistent with his character as a purchaser on his own account. This statement was sustained by several authorities cited, and of its correctness there can be no doubt. . . . Fidelity in the agent is what is aimed at, and, as a means of securing it, the law will not permit the agent to place himself in a situation in which he might be tempted by his own private interest to disregard that of his principal.' Citing People v. Township, 11 Mich. 222. This doctrine, to speak again in the beautiful language of another, 'has its foundation, not so much in the commission of actual fraud as in that profound knowledge of the human heart which dictated that hallowed petition, 'Lead us not into temptation, but deliver us from evil,' and that caused the announcement of the infallible truth, 'A man cannot serve two masters.' These quotations we shall properly close with the language of Story, Ag. § 210, quoted, with the approval of this court, in Englehart v. Plow Co., 21 Neb. 48 (31 N. W. Rep. 391): 'In this connection, also it seems proper to state another rule in regard to the duties of agents, which is of general application, and that is that, in matters touching the agency, agents cannot act so as to bind their principals where they have an adverse interest in themselves.' . . . It is unnecessary to quote further illustrations of the correctness of the instructions given the jury at the request of the defendant in error. The same principles announced in these instructions pervade all the text works, and the decisions of the courts, which have to deal with the relations of principal and agent. In none of them is recognized the right of the suppression of important facts, of which the principal had a right to be informed, as a part of 'the secrets of the real

as to the prices received for said property, and as to the matter of caring for and disposing of the said property, provided the jury find that the defendant used ordinary care and prudence in caring for, selling and disposing of said property, and would only be obliged to account to the plaintiff for the proceeds arising from said sale after paying the expenses of feeding and caring for said property.[20]

§ 604. **Brokers—Action for Compensation—License—Series.** (a) This is an action brought by W. R., the plaintiff, against G. R. and W. P., trading as R. & P., the defendants, for the recovery of the sum of $———, claimed to be due and owing from the defendants for services rendered by the plaintiff in the month of March, 1903. The plaintiff, a real estate broker of the city of Philadelphia, claims that on or about March 9 or 10, 1903, he secured or arranged a meeting between the defendants and the L. Imp. Co., or its representative, which meeting resulted in the defendants securing a contract for the erection of 127 buildings in this city at or near the corner of V ave. and S st.; and that in return for such service the defendants verbally agreed with the plaintiff that they would pay him 1 per cent. of the gross amount of the said contract, that is to say, 1 per cent. of the total amount of the moneys advanced for the purchase of the ground and construction of the houses, and secured by mortgages upon properties covered by the contract. The plaintiff further claims that the total amount of moneys so advanced and so secured was the sum of $———, and that his commission, under said agreement, amounts to the sum of $———; that being 1 per cent. of said sum. The defendants deny that they ever at any time agreed to pay the plaintiff the commissions claimed by him, or any sum whatsoever, and also deny that he was in any manner instrumental in securing the contract for the erection of the houses aforesaid. They insist, on the contrary, that the service for which the plaintiff is seeking to recover from them in this action was performed by another person, and one who had no connection or relation at all with the plaintiff.

(b) There are several counts in the plaintiff's declaration; some of them averring that the defendants agreed with the plaintiff that they would pay him the commissions claimed in consideration of his having brought them in contact with the parties with whom they made the contract for the erection of said houses, and thereby enabling them to secure the said contract. The declaration contains also the common counts for work and labor performed, and services rendered by the plaintiff for the defendants in and about the business aforesaid; and, upon these counts, even should you believe there was no agreement upon the part of the defendants to pay the commissions claimed, or any other sum, the plaintiff would be entitled

estate business,' as was claimed by plaintiff in error—in his testimony."

20—McCready v. Phillips, 44 Neb. 790, 63 N. W. 7 (12).

to recover such sum as you believe from the evidence the services he rendered were reasonably worth to the defendants, provided you are satisfied from a preponderance of the evidence that he did render services which resulted in the defendants securing the said contract.

(c) We have been asked by the defendants to charge you that inasmuch as it does not appear from the evidence that the plaintiff was licensed to engage in, or carry on, the business of a real estate broker in Pennsylvania at the time he claims to have contracted in that capacity to serve the defendants, that such contract, if it was made, is not therefore entitled to have applied to it the construction attached to the contract of a licensed real estate broker in Pennsylvania. We will say, in response to this request, that there is nothing in the evidence to show that a real estate broker is required, under the law of the state, to have a license in order to carry on said business, and there is no averment in the pleadings that the plaintiff was acting as a licensed real estate broker in the transaction of the business in question. It is not essential to the plaintiff's recovery in this action that he should have been actually requested by the defendants to bring them in touch with the L. Imp. Co. If you believe that the plaintiff, with the consent of the defendant, brought the contracting parties together, and was thereby the procuring cause of the contract actually made between the defendant and said company, then the said plaintiff would be entitled to such commissions as he may have proved the defendants had agreed to pay him for the procuring of such contract, or, in the absence of such proof as to the payment of the commissions, to such compensations as the jury may think he reasonably deserves for the procuring of such contract.

(d) A real estate broker is entitled to his compensation or commission, either on a *quantum meruit*, or under the express terms of the contract of agency, whenever he procures for his principal a party with whom the principal is satisfied and who actually makes a contract with the principal at a price acceptable to the principal, provided that the broker was the procuring cause.[20a]

(e) But if you believe from the evidence that some person other than the plaintiff performed the service that the plaintiff claims to have performed, which was the procuring cause of the contract made between the defendants and the L. Imp. Co., and that there was no agreement by the defendants to pay the commissions claimed, or, in other words, if you are not satisfied that the plaintiff did perform the service he claims to have performed, and do not believe the defendants agreed to pay the plaintiff the said commissions, he would not be entitled to recover anything in this case, you must be satis-

20a.—Seabury v. Fidelity, 205 Pa. 234, 54 Atl. 898; Sweeney v. Oil Co., 130 Pa. 193, 18 Atl. 612; Keys v. Johnson, 68 Pa. 42; Edwards v. Goldsmith, 16 Pa. 43; In re Gibson's Estate, 161 Pa. 177, 28 Atl. 1079; Hipple v. Laird, 189 Pa. 472, 42 Atl. 46; Reed's Ex'rs v. Reed, 82 Pa. 420.

fied from a preponderance of the evidence that he is entitled to recover.

(f) If you find the evidence conflicting upon any material point, it is your duty to reconcile it if you can, and if it is irreconcilable you should accept as true such evidence as you believe most entitled to credit, taking into consideration the character of the witnesses, their apparent fairness and accuracy, their disinterestedness, and all the other circumstances of the case as disclosed by the evidence.[21]

BOARD OF TRADE TRANSACTIONS.

§ 605. **Contracts Legal.** (a) If the jury believe, from the evidence, that the defendant employed the plaintiff to act for him in the capacity of broker or commission man to purchase and sell grain for him on the board of trade, and that, acting under that employment, the plaintiff did in good faith contract to purchase for the defendant 2,000 bushels of No. 2 corn, to be delivered during the then next month of ———, then the fact, if proved, that the defendant intended to resell the same corn before the time of its delivery under such contract of purchase, would not alone render the transaction a gambling contract or in any manner invalidate it.[22]

(b) The jury are further instructed, that if one of the parties to a contract for the future sale and delivery of grain contemplates and intends an actual sale and delivery, then the transaction would be legal and binding, irrespective of any illegal purpose entertained by the other party; a contract cannot be a gambling contract unless both parties concur in the illegal intent.[23]

§ 606. **Putting up Margins Held Legal—Usage and Custom Upon the Board Governs the Transactions in Absence of Express Agreement.** (a) If the jury believe, from the evidence, that the plaintiffs, as commission merchants, did, at the time alleged, enter into contracts upon the board of trade in C., for the purchase of, etc., upon the order of the defendant and as ordered by him, and that by the (rules of the board), or by the general and uniform custom and usage prevailing among dealers on the board, the plaintiffs were required to furnish a certain sum of money as margins upon such contracts, then and in that case it became the duty of the defendant to furnish to the plaintiffs a reasonable sum as such margins, when called upon so to do. And if the jury further believe from the evidence that the plaintiffs did enter into such contracts, as aforesaid, upon said board and upon the order of the defendant, and were required by the (rules) or customs and usage aforesaid to put up margins, and that they called upon the defendant for a reasonable

21—The six instructions above were approved in Richards v. Richman, — Del. —, 64 Atl. 238.

22—Sawyer v. Taggart, 14 Bush (Ky.) 727.

23—Gregory v. Wendall, 40 Mich. 432; Story v. Solomon, 71 N. Y. 420; Wall v. Schneider, 59 Wis. 352, — N. W. —.

sum of money as such margins, and that the defendant when so called upon neglected or refused, or was unable to furnish the same within a reasonable time, then the plaintiffs had the right to close out the contracts so made by them, and thereby determine the loss, if any, sustained by them by reason of such contracts, and call upon the defendants to make good such loss; provided the jury believe, from the evidence, there was no special contract or arrangement between the parties, varying these rules or usages and customs.

(b) If the jury believe, from the evidence, that some time on and about, etc., the plaintiff and the defendant entered into a contract, whereby it was in good faith mutually agreed between them that defendant should sell to the plaintiff 25,000 bushels No. 2 corn, at 43 cents per bushel, deliverable to the plaintiff at any time during the month of (November) following, at the option of the defendant, the plaintiff to pay for the same at the price of 43 cents per bushel on delivery, then such contract would be valid and binding upon the parties.[24]

§ 607. Right to Close Out Contracts and to Determine the Loss When the Defendant Neglects, Refuses or is Unable to Furnish the Required Margins. (a) If the jury believe, from the evidence, that on and about, etc., the parties in good faith entered into a contract whereby it was mutually agreed between them that defendant should sell to the plaintiff 25,000 bushels of No. 2 corn, at 43 cents per bushel, deliverable to the plaintiff at any time during the month of, etc., at defendant's election, the plaintiff to pay for the same at the price aforesaid on delivery—and if the jury further believe from the evidence that such contract was made between the parties as members of the board of trade at, etc., and under the rules of said board, and that it was one of the rules of said board or that there was any general and uniform custom or usage among dealers on said board that when such contracts had been made and the price of the grain should advance before the time of delivery of the same, that then the purchaser had the right to call upon the seller to put up or deposit a sum of money as margins reasonably sufficient to insure the performance of the contract by the seller and that in case of his failure so to do that the purchaser should have the right to go upon the board and purchase an equal amount of grain at the then market price for account of the seller, charging him with the difference between the contract price and such market price—and if the jury further believe from the evidence that on or about, etc., the market price of said corn on said board of trade did advance to about 49 cents per bushel and that plaintiff then requested defendant to put up such margins, and defendant neglected and refused to do so within a reasonable time after such demand, then the plaintiff had a right to go into the market and

24—Denton v. Jackson, 106 Ill. 324; Miller v. McLagan, 60 Ill. 433; Corbit v. Underwood, 83 Ill. 317.

purchase for the account of the defendant 25,000 bushels of No. 2 corn to be delivered, etc., at the then market price.[25]

(b) If the jury find, from the evidence, that there was a contract between the parties as to the amount of margins which plaintiff should put up for the protection of the defendants in their deals for him, and that the plaintiff did not keep up the margin which he had contracted to do, and that demand therefor was made by the defendants, and that upon such demand the plaintiff neglected and refused to put such margins within a reasonable time after such demand, then the defendants would have a right to close out the plaintiff's deals in accordance with the usages and customs prevailing among dealers on the board of trade, provided the jury believe, from the evidence, that there was, at the time, any general uniform and well known usage or custom governing such matters among dealers on the board of trade.[26]

§ 608. **Board of Trade Transactions for the Privilege of Selling and Future Delivery of Grain Held to be Gambling Contracts Under Certain Circumstances.** (a) The jury are instructed that a contract for the sale and future delivery of grain, by which the seller has the privilege of delivering or not delivering, and the buyer the privilege of calling or not calling for the grain, just as they choose, and which on its maturity is to be filled by adjusting the differences in the market value, is an option contract in the nature of a gambling transaction, prohibited by law. And, if the jury believe, from the evidence, that the purchases and sales of grain involved in this suit were made, and were intended by both ———— and the firm of ———— to be made, as a means of gambling on the fluctuation in the market price of such grain, and that no delivery or acceptance of grain was intended by either of the parties, then the plaintiff, ————, is not entitled to recover for any alleged profits or margins, and the defendants, ————, are not entitled to recover for any margins upon the losses alleged to have been sustained by them. Neither can recover in such event.[27]

(b) The jury are instructed, that a contract for the sale and future delivery of grain, by which the seller has the privilege of delivering or not delivering, and the buyer the privilege of calling or not calling for the grain, just as they choose, and which, on its maturity, is to be filled by adjusting the differences in the market

25—Follansbee v. Adams, 86 Ill. 13.

26—Denton v. Jackson, 106 Ill. 433.

27—Watte v. Costello, 40 Ill. App. 307 (309). That the foregoing is a correct statement of the law can not be gainsaid, citing: Criminal Code, Starr & C. Ill. Stats.; Pickering v. Cease, 79 Ill. 328; Cothran v. Ellis, 125 Ill. 496, 16 N. E. 646; Tenney v. Foote, 4 Ill. App. 594; Schneider v. Turner, 27 Ill. App. 220; Same v. Same, 130 Ill. 28, 22 N. E. 497; Gregory v. Wendell, 39 Mich. 337, 33 Am. Rep. 390; Yerkes v. Salomon, 11 Hun 437; Cunningham v. The Nat. Bank of Augusta, 71 Ga. 400, 51 Am. Rep. 266; Barnard v. Backhaus, 52 Wis. 593, 6 N. W. 252; Fareira v. Gabell, 89 Pa. St. 294; Hawley v. Bibb, 69 Ala. 52; In re Green, 7 Biss. 338; Rudolf v. Winters, 7 Neb. 125.

value, is an option contract, in the nature of a gambling transaction prohibited by law.[28]

(c) A dealer on the board of trade has a right to sell and agree to deliver at some future time property which he does not own at the time but which he expects to go into the market and buy, but an agreement for a sale and future delivery of grain is a gambling contract and illegal if it is the understanding and intention of both the parties at the time that there is to be no actual sale, purchase, receipt or delivery of the grain, at the time fixed for the delivery thereof but only that the parties shall only then settle and the purchaser receive or pay the difference between the agreed price and the market price according as the market price is less or greater than the agreed price.[29]

(d) One of the questions to be passed upon by the jury is this: Was there an actual bona fide contract between the parties, for a sale of corn to be delivered by the seller and received by the purchaser, or was it understood that no grain should be actually purchased or delivered, but only that a settlement should be made upon the basis of the market price at the time mentioned for delivery.[30]

(e) If the jury believe, from the evidence in this case, that the deals or contracts shown in evidence were a mere contrivance for enabling the parties thereto to hazard the deposit of money on the fluctuations of the market value of No. 2 spring wheat, and were not, in fact, real contracts for the sale of wheat by the parties thereto, then the jury are instructed, as a matter of law, that such deals or contracts were illegal and void, and would be binding on neither party.[31]

(f) If by the contract for the sale of the wheat in question neither party intended to deliver or receive any wheat under the contract, but that the parties expected thereby to wager the margin deposited, and that either party had the option to annul the contract at any time by refusing to put up additional margins, and that, in fact, the contract was a mere devise for carrying out a wager on the market value of the wheat and was not a bona fide sale or agreement to sell for future delivery, then the jury are instructed that such contract is illegal and void.[32]

(g) Although the jury may believe, from the evidence, that at or about the time stated, the plaintiff and defendant entered into a contract by which it was nominally and in terms agreed between them, etc., still, if the jury further believe from the evidence that at the time of making said agreement, neither of the parties contemplated an actual sale and delivery of said corn, but that it was under-

28—Pickering v. Cease, supra; In re Green, supra; Rudolf v. Winters, supra.

29—Gregory v. Wendall, 40 Mich. 432; Ramsey v. Berry, 65 Mo. 574.

30—Kirkpatrick v. Bousell, 72 Pa. St. 155.

31—Lowry v. Dillman, 59 Wis. 197, 18 N. W. 4; Barnard v. Backhaus, 52 Wis. 593, 6 N. W. 252.

32—Tomblin v. Callen, 69 Ia. 229, 28 N. W. 573; First Nat. B. v. Oskaloosa P. Co., 66 Ia. 41, 23 N. W. 255.

stood between them that the said deal was to be settled by the parties by the payment from one to the other of the difference between the agreed price and the market price on the day of settlement, then such a contract is in law regarded as a gambling transaction and is illegal and void, and neither party can sustain an action for a breach of such contract.[33]

§ 609. **Options on Board of Trade—Delivery—Settlement Made on Difference in Price.** The jury are instructed that the mere fact, if proven, that the transactions on the board of trade set out in plaintiff's declaration were closed out before maturity and an account of the losses rendered to defendant upon the basis of difference in price, does not of itself necessarily prove that the parties from the beginning intended that the commodities sold should not be delivered, and settlement therefor should be made on the basis of difference in price; and you are further instructed that unless you believe from the evidence that there was an agreement or understanding between the plaintiff and the defendant at or before the sale of any of the grain in controversy, that no grain should be delivered or received, and settlements therefor should be made only on differences, then you should find for the plaintiff for such amount, if any, as you believe from the evidence to be due from the defendant.[34]

§ 610. **Considerations Determining the Legality of Board of Trade Transactions—Series.** (a) The plaintiffs claim that defendant is indebted to them in the sum of $——— as commission due them as commission merchants in the purchase of ——— bushels of wheat; also that they purchased in the city of ——— five thousand bushels of wheat for the defendant, and by the terms of such sale the defendant was required to place in their hands a sufficient sum of money to protect and indemnify them against loss, and by reason of the decline in wheat the sum of $——— in the hands of plaintiffs belonging to the defendant was not a sufficient protection and indemnity to them against loss; and after notice to defendant to place in their hands a greater sum of money, they sold the wheat, which they claim a right to do, at a loss to them of $———, from which deducting the sum of $———, made a clear loss of $———.

(b) The defendant insists that they purchased no wheat nor did the plaintiff sell him any wheat, but that in the month of ————, he contracted with plaintiff for the purchase of ——— bushels of wheat to be delivered in the month of ————, with the mutual understanding that no wheat was purchased or sold or would be required to be delivered, but that the transaction should be adjusted between the parties upon the basis of the market value of wheat in C. at the date of the pretended purchase and pretended sale (on maturity of the contract) when, in fact, no wheat was bought or

33—Tenney v. Foote, 4 Ill. App. 594.

34.—Oldershaw v. Knoles, 6 Ill. App. 325: Dillon v. McCrea & Co., 59 Ill. App. 505 (511).

sold. In brief, that it was a bet or wager on the price of wheat at a given time.

(c) If defendant did purchase of plaintiffs five thousand bushels to be delivered to him at a future date, this would be a legitimate and proper transaction, and it is competent for parties to make such contract.

(d) It is for you to determine from the evidence whether the plaintiffs were by the nature of the contract authorized to sell the wheat before the maturity thereof, and whether the plaintiffs should have served notice upon the defendant that a further deposit of money was demanded from him to make his contract good, and if in point of fact such notice was served on defendant. If by the terms of the contract and nature of the business the plaintiffs required of the defendant any sum of money "to make his deal good," it was the duty of plaintiffs, before they could "close him out" or sell his wheat, to notify him of such fact, and give him a reasonable time to respond. Unless there was such a usage or custom in the business being transacted, and in connection with the transaction out of which the alleged indebtedness grew of which the defendant was advised or had notice, and demand was waived by him, then the plaintiffs by selling the wheat before the date of delivery of the wheat or the maturity of the contract for delivery, could not sell the same and charge the defendant with the loss thereon.

(e) If the plaintiffs purchased the wheat for the defendant, and by reason of his failure he failed to pay up further margins to protect them after a "call" therefor, by reason of such failure they did, to protect themselves from loss while holding such wheat for the defendant, sell the same, and a loss was incurred, this was within their contract and was contemplated and understood by them, then the defendant must make the loss good and respond in damages to the extent of such loss.

(f) If the sum of money sued for was paid out at the request of defendant, or a liability was incurred by the plaintiff at the request of defendant, whereby they were required to pay out such sum of money upon such liability for his use and benefit, then he should refund such sum of money thus paid out.

(g) If it was the mutual contract of parties, plaintiff and defendant and they so actually understood the same that no wheat was actually to be delivered, and that the contract was not in fact to be performed, that the "deal" should be settled upon the basis of the contract and market prices, then the plaintiffs cannot recover in this case. But it is not sufficient that the defendant so understood the contract or "deal," but the plaintiffs must be a party to such contract and understanding. If it was a proper and lawful contract on their part, and entered into by them in good faith, intending to perform the same, then it is immaterial as to the private understanding of the defendant.[35]

35—Above series approved in Whitesides v. Hunt, 97 Ind. 191 (192).

CHAPTER XXXVII.

CONTRACTS.

See Erroneous Instructions, same chapter head, Vol. III.

§ 611. What Constitutes a Contract—Assent of Parties. The court instructs the jury, that before there can be a contract between two parties, the minds of the two parties must come together and agree upon all the terms and conditions of the contract; or, as is sometimes said, the minds of the contracting parties must meet.[1]

§ 612. **Capacity to Contract—Presumption.** (a) The jury are instructed, that the law presumes that all adult persons have sufficient intellectual capacity to transact business with ordinary intelligence, and the party alleging incapacity must overcome this presumption by a preponderance of evidence.[2]

1—Page on Cont. Sec. 22; 1 Parsons on Cont. 475; Baker v. Johnson Co., 37 Ia. 186; Steel v. Miller, 40 Ia. 402; Davidson v. Porter, 57 Ill. 300, 11 Am. Rep. 15.
2—Page on Cont. Vol. 2, Sec. 849;

(b) The court instructs you, that the legal presumption is, that all persons of mature age are of sound mind and memory, and this presumption continues until the contrary is shown by a preponderance of evidence.[3]

(c) The jury are instructed that the law presumes every man to be sane until the contrary is proved, and the burden of proof rests upon the party alleging insanity.

(d) The jury are otherwise instructed that the law presumes every man to be sane and competent to transact his business if of lawful age until the contrary is shown, therefore the jury must presume and find that ——— at the time of the execution of said deed, bill of sale and lease, was of sound mind and competent to execute the same unless a preponderance of the evidence in this case proves to the contrary; and if, after considering all the evidence in the case, the jury are unable to determine from the evidence whether ——— was of sound mind and mentally competent to execute said papers or not, they should find by their verdict that he was of sound mind and was so competent.[4]

§ 613. Degree of Insanity Necessary to Relieve from Consequences of Acts. (a) The court instructs you, as a matter of law, that when the mind is so deranged that a person cannot comprehend and understand the effect and consequences of an act, or the business in which he may be engaged, then the law will relieve him from the consequences of his acts; but so long as he is possessed of the requisite mental faculties to transact rationally the ordinary affairs of life, he will not be released from the responsibility that rests upon the ordinary citizen.[5]

(b) The court instructs you that the subsequent acts are to indicate the previous state of mind, and a man's capacity is not to be treated on the scientific theories of experts, and say a man was crazy a year ago, because he has softening of the brain today, or because he had softening of the brain incipient or to a considerable extent before. It is, no doubt, an insidious disease of slow growth, and to everybody's observation a man may be affected more or less at one time with that disease and yet be as competent to attend to business as any of us are; and so it becomes like epileptic fits. It more or less affects the mind, and every accession of the disease or exacerbation may be indications of a certain development, of its coming to a certain point in the continuous growth; but until you get to a certain point the man may be, at least bodily, and the mind, to some extent, affected, and yet he be competent to transact his ordinary business as well as anybody. The point of this is that although this man may not, but assuming he did have (which is denied), trouble with his brain,

2 Parsons on Cont. 572; McCarty v. Kearnan, 86 Ill. 291.

3—Silly v. Waggoner, 27 Ill. 395.

4—Guild et al. v. Hull et al., 127 Ill. 523 (533), 20 N. E. 665, 11 Am. St. Rep. 147, citing Menkins v. Leightner, 18 Ill. 282.

5—Harris v. Wamsley, 41 Ia. 671; Titcomb v. Vantyle, 84 Ill. 372.

softening of the brain, preceding this deed, yet if it was not of such a character, and did not go to such an extent, as to unfit him for ordinary business comprehending the ordinary relations he had to his affairs and life, and his duty to society, it would not be sufficient to set this deed aside. If, however, you think that it went to that extent, and in making this deed he was not fully conscious what he was about, not rational enough to transact the ordinary affairs of life, of course the deed falls.[6]

In this case the plaintiff is entitled to recover unless they are reasonably satisfied from the evidence that the defendant was at the time of making the contract of unsound mind, and to the extent that he was not capable of attending to the ordinary affairs of life.[7]

§ 614. Mental Powers Impaired by Age, Weakness or Bodily Infirmity Not Sufficient to Vitiate a Deed. The jury are instructed that, if they believe, from the evidence, that the grantor of the deed had memory and mind enough to recollect the property he was about to convey, and the person to whom he wished to convey it, and the manner in which he wished it to be disposed of, and to know and understand the business he was engaged in, such person is, in contemplation of law, of sound mind, and his age or bodily infirmity would not vitiate a conveyance made by one possessing such capacity.[8]

§ 615. When a Man Is Held to Be of Sound Mind—Improvident. (a) The court instructs you that if a person is capable of reasoning correctly on the ordinary affairs of life, or is capable of comprehend-

6—King v. Humphreys, 138 Pa. 310, 22 Atl. 19. In this case the court held that the mental trouble must be of such an extent and character as to unfit the party for ordinary business, comprehending the ordinary relations he has to society and life in order to set a deed aside. Continuing the lower court said: "Though I may go crazy tomorrow, show I am insane today, manifest unmistakable symptoms of insanity; yet, if able to do what I am doing now, if I can attend to the ordinary affairs of life, if I am fully, to all appearances, rational, and in my right mind, it would be absurd to say, because I had a general stroke of paralysis, or from some other unforeseen cause, I become a raving maniac tomorrow, and had to be carried to D, that the charge or the deed I had made today was bad. That is not the law."

7—Dominick v. Randolph, 124 Ala. 557, 27 So. 481 (485).

8—Guild v. Hull, 127 Ill. 523 (534), 20 N. E. 665.

"This instruction should have been given. His age, weakness or bodily infirmity would not render him incapable of disposing of his property by deed or will. As said in Lindsey v. Lindsey, 50 Ill. 79: 'The circumstance that the intellectual powers have been somewhat impaired by age is not sufficient, if the contracting party still retains a full comprehension of the meaning, design and effect of his acts.' And again: 'Under these circumstances, it is not evidence of either mental imbecility or undue influence that the deceased conveyed his property to his son for a fraction of its value, taking from him notes secured by mortgage for such sum as he thought equitable for the benefit of his other children, and a bond for his own maintenance during the remainder of his life.' See also in this connection Wiley v. Ewalt, 66 Ill. 26; Clearwater v. Kimler, 43 id. 273; Trish v. Newell, 62 id. 196; Meeker v. Meeker, 75 id 260; Stone v. Wilburn, 83 id 105; Pickerell v. Morss, 97 id 220; English v. Porter, 109 id 528; Burley v. McGough, 115 id. 11, 3 N. E. 738."

ing and understanding the consequences which usually accompany ordinary acts, he will be held to be of sound mind, and be bound by his contracts.[9]

(b) The fact that a man made an improvident bargain; that he is generally unthrifty in his business, or unsuccessful in one or more enterprises—does not of itself prove him to be *non compos mentis*.[10]

§ 616. Mental Capacity to Make Contract—Insane Delusion—Relation of Same to Subject Matter. The jury are further instructed that, although they may believe from the evidence that either before, at the time or after the making of the written contract in question, defendant had insane delusions on some subjects, yet if the jury further believe, from the evidence, that such delusion was in no way related to the plaintiff or the subject matter of the contract here in question, and that in making such contract defendant was in no means influenced thereby, but that in the making of said contract he possessed mind, memory and sense sufficient to know and apprehend the scope, force and effect of that contract, then he was mentally capable of making said contract and the jury should so find.[11]

§ 617. Partial Insanity—Contract Entered Into by Reason Thereof. The court charges the jury that proof of partial insanity will invalidate contracts generally, and would be sufficient to defeat an action upon a contract, which contract was the direct offspring of partial insanity, although the party making the contract, at the time of making it was sane in other respects upon ordinary subjects.[12]

§ 618. Drunkenness—Procurement by Other Party to Contract—Degree of to Avoid. (a) If you believe, from the evidence, that the plaintiff procured intoxicating liquors and influenced the defendant to drink of the same until he became so intoxicated that he lost the

9—Baldwin v. Dunton, 40 Ill. 188.

10—Dominick v. Randolph, 124 Ala. 557, 27 So. 481. The Court said, "In re Carmichael, 36 Ala. 514. It is contended by the appellant that the giving of this charge was an invasion of the province of the jury. We do not so understand and construe it. It asserts a legal proposition and was based upon evidence in the case, which prevented it from being abstract."

11—Sands v. Potter, 165 Ill. 397 (401), aff'g 59 Ill. App. 206, 46 N. E. 282, 56 Am. St. Rep. 253.

"We are not aware that there is any fixed formula of words in which the mental capacity or incapacity of a person to make a contract must be expressed. It is true that in the case of Lindsay v. Lindsay, 50 Ill. 79, 109 Am. Dec. 489, in passing upon the question of the mental imbecility that would invalidate a contract, this court said: 'In the absence of undue influence, there must be such a degree of mental weakness as renders a party incapable of understanding and protecting his own interests;' and that language is used in some subsequent cases."

12—Dominick v. Randolph, 124 Ala. 557, 27 So. 481 (485).

"Under the decision of Cotton v. Ulmer, this charge contains a correct statement of the law. There was testimony tending to show insanity, and also testimony tending to show a species of mania on the part of the defendant for buying and selling, regardless of profit or loss. The charge was, therefore, not abstract, and, as asserting a correct legal proposition, should have been given." Cotton v. Ulmer, 45 Ala. 378.

rational use of his mental faculties, and so that he did not understand what he was doing, and, while he was in this condition, procured his signature to the contract in question, then such contract would be void as against the said defendant, and he is not bound thereby.[13]

(b) The court instructs the jury, as a matter of law, that to render a transaction voidable on account of the drunkenness alone of a party to it, it should appear, from the evidence, that he was so drunk as to have drowned his reason, memory and judgment, and impaired his mental faculties to an extent that would render him wholly idiotic for the time being.[14]

(c) If you believe the plaintiff has established each and all of the issues mentioned in the preceding instruction, by a preponderance of the evidence, then before the defendant can avoid a judgment against him, he must show by a preponderance of the evidence that said contract was signed by the defendant at a time when he was so intoxicated that he did not have sufficient mental ability to understand the nature of the contract he was entering into.[15]

§ 619. **Minor's Contract for Necessaries.** It has always been held that the minor might bind himself by contract for necessaries, and that such contract, when executed, when completed, if reasonable under the circumstances, or not so unreasonable as to be evidence of fraud or undue advantage, cannot be repudiated by him. Now, there is no presumption that any one acts fraudulently towards a minor. It cannot be said that A. committed a fraud in selling a watch, without evidence; and whether everything was fair, or whether he committed any fraud or deception, is for the jury to say; it cannot be presumed without evidence. The party that comes into a case, and says that a fraud has been perpetrated, or undue advantage taken, or deception practiced, must produce evidence to sustain that point. There is no presumption of fraud; so that if this watch was not a necessity, or clearly to the boy's prejudice, and not for his benefit, then he could avoid it, and he should not be charged with the watch; and the defendant should deal in good faith with the infant if it was not a necessity; and, if any unfair advantage was taken of the boy, then he might avoid the contract—then this contract as to this watch, under the circumstances of this case, might be avoided and repudiated by the boy.[16]

§ 620. **What Is Consideration—A Promise for a Promise Is a Good Consideration.** (a) The court instructs the jury, that whatever works a benefit to the party promising, or whatever works any loss or disadvantage to the person to whom the promise is made, although

13—Mitchell v. Kingman, 5 Pick. 431; Page on Cont. Sec. 903; 1 Pars. on Cont., 383, 385.

14—Bates v. Ball, 72 Ill. 108; Cavender v. Waddingham, 5 Mo. App. 457; Miller v. Finley, 26 Mich. 249, 12 Am. Rep. 306; Johnson v. Phifer, 6 Neb. 401.

15—Hauber v. Leibold, — Neb. —, 107 N. W. 1042.

16—Welch v. Olmsted, 90 Mich. 492, 51 N. W. 541 (542).

without any benefit to the promiser, is a sufficient consideration to support a contract or agreement.[17]

(b) One promise is a good consideration for another promise, and if the jury believe, from the evidence, that at the time of the alleged contract the plaintiff promised and agreed with the defendant that he would, etc., and that in consideration thereof the defendant then agreed with the plaintiff that he would, etc., then one of these promises is a good consideration for the other, and the several agreements are binding upon the respective parties.[18]

§ 621. **Consideration Known or Understood by Parties.** The jury are instructed that in order to hold defendants in this suit under the pleadings, it is incumbent upon the plaintiff to show, by a preponderance of the evidence, that the consideration relied upon for their contract was made known to or understood by them at the time of the said contract.[19]

§ 622. **New Promise to Perform Legal Obligation.** The court instructs the jury, that if one party promise another to do what he is already under legal obligation to perform, then such a promise is not a good consideration for a promise by the other party, and a promise by him upon such a consideration is not binding, and cannot be enforced against him by suit.[20]

§ 623. **Inhibition Against Engaging in Business in Same City—Consideration for.** You are instructed that one of the issues in this case is the consideration of the contract sued on in this case. You are instructed in this connection that if you find from the evidence that ——— was the purchase price of defendant's interest in the partnership property, and that such sale was actually agreed on and reduced to writing and that said contract contained no inhibition against the defendant engaging in business in Nebraska City, Neb., and that there was no further consideration for the contract sued on in this case, and in case you so find from the evidence you will return a verdict for the defendant.[21]

17—Page on Cont., Vol. I, Sec. 296; 1 Pars. on Cont. 430; 1 Pars. on N. & B. 175.

18—Dockray v. Dunn, 37 Me. 442; Keister v. Miller, 25 Penn. St. 401.

19—McMicken v. Safford, 197 Ill. 540 (543), aff'g 100 Ill. App. 102, 64 N. E. 540.

20—Collins v. Godefrey, 1 B. & Ad. 950; Early v. Burt, 68 Ia. 716, 28 N. W. 35, Tucker v. Vaughn, — Minn. —, 23 N. W. 846.

21—Hauber v. Leibold, — Neb. —, 107 N. W. 1042 (1044).

"It is contended that the court erred in refusing to give the instruction hereinbefore set out, tendered by the defendant. We are of the opinion that this contention is well founded. The instruction tendered covers one theory of the defense, namely, that the contract in suit was made after the parties had already bound themselves by valid contract in writing, and in substantially the same terms, save the stipulation against engaging in the same business in Nebraska City, and without any new or additional consideration for such stipulation. If this theory be established and as before stated, there is evidence tending to support it, the stipulation is without consideration, and the defendant is not bound by it. It is well settled that a party to an action is entitled to have the jury instructed

§ 624. **Assignment of Judgment—Amount Paid—Solvency.** It is of no importance in this case what consideration plaintiff paid for the assignment of this judgment to him. The plaintiff's rights are precisely the same, whether he paid one cent or the full amount of the judgment, with interest. And as I have said, it would make no difference if in fact the judgment only cost the plaintiff a dollar. It is of no importance, either, whether the assignor C. was, at the time of the assignment, solvent or insolvent. And if it was not agreed, as the defendant says it was, between the parties, that the services in question should be accepted in full satisfaction of the judgment, it is of no importance whether the defendant in this case was solvent or insolvent when the assignment was made or at any time since that time.[22]

§ 625. **Release without Consideration—Nudum Pactum.** (a) The court instructs you that a mere promise by the plaintiff to release all claim against the defendant for salary is what the law terms "*nudum pactum,*" that is a promise without consideration, and is not binding no matter how solemnly made, unless supported by a consideration.

(b) The court instructs you that a mere offer to release a valid claim is not binding unless accepted, and a valuable consideration paid therefor, and if the jury believe from the evidence that the plain-

with reference to his theory of the case, when such theory is presented and supported by competent evidence. Boice v. Palmer, 55 Neb. 389, 75 N. W. 849, and authorities cited. It is the duty of the trial court to instruct the jury as to the issues. Sanford v. Craig, 52 Neb. 483, 72 N. W. 864; Kyd. v. Cook, 56 Neb. 72, 76 N. W. 524, 71 Am. St. Rep. 661, and cases cited."

22—Dalby v. Lauritzen, — Minn. —, 107 N. W. 826.

"The defendant insists that the instruction was misleading, erroneous, and prejudicial to the defendant. Among other things, he urges that the question of defendant's insolvency at the time of the settlement was not at all a collateral fact; that the defendant's whole defense would fall, unless he proved that there was a valid consideration for the settlement and compromise. To this end he cites, Molyneaux v. Collier, 13 Ga. 406 (422), in which inter alia, the doctrine is set forth that while the payment of a sum less than the amount of a liquidated debt under an agreement of the creditor to accept the same in satisfaction of the debt forms no bar to the recovery of the balance, yet if the creditor agree with an insolvent debtor to accept his personal labor in value less than the whole debt, the agreement would be valid. And see Rice v. London, 70 Minn. 77, 72 N. W. 826. The record, however, shows that the court conceded in effect the legal sufficiency of the consideration and left to the jury the question of whether the parties agreed to a compromise as a matter of fact. This might have been on the theory that any benefit or even the legal possibility of benefit to the creditor thrown in is sufficient to support a satisfaction of a larger debt by a smaller sum (Cumber v. Wane, 1 Strange 426, 1 Smith's Lead. Cas. (11th Ed.) 338, that, for example, a horse, hawk or robe would be a good consideration, quite regardless of the amount. (Foakes v. Beer, L. R. 9 App. Cas. 605; Jaffray v. Davis, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710.) So a promise to render future services though of a lesser value than the amount of the judgment might be a satisfaction. The soundness of the court's theory, upon which he held, as a matter of law, that the compromise, if in fact agreed to, would prevent recovery by the plaintiff, is not before us for review, and on this appeal the defendant is not in position to complain of its holding."

tiff merely offered to release his salary at the conversation alleged to have been held ———, on condition that D, S, W and P would purchase or sell 3,000 shares of the capital stock of the defendant corporation, and that the said parties did not accept said offer or make it a condition precedent on which they would purchase or sell said stock, they must find for the plaintiff.[23]

§ 626. **Failure of Consideration Where There Is No Fraud.** The court instructs you that as a rule, where there is no fraud, and a party receives all the consideration he contracted for, the contract will not be set aside for want or failure of consideration; and where the value of the consideration is indefinite and uncertain, the parties have a right to determine it for themselves, and courts and juries ought not to overturn their decisions upon its sufficiency; and whether one contracts for the performance of an act or several acts which will afford him pleasure, gratify his ambition, or please his fancy, his estimate of the value should be left undisturbed. And the fact that love and affection or kinship may have been part of the consideration cannot defeat the plaintiff's right of recovery.[24]

§ 627. **Failure of Consideration—False Representations—Caveat Emptor.** The jury are instructed that if they believe from the evidence that before and at the time of the purchase of said stock and the giving of said note, the plaintiff made representations and statements to the defendant concerning the value of such stock and the business being done by said company and its financial condition; that said statements and representations were false; that defendant was a stranger in the city of ———, and had no adequate means of ascertaining the truth or falsity of said statements; that relying upon said statements of said plaintiff as true the said defendant purchased said stock and gave said note in payment thereof; and if you further believe from the evidence that the plaintiff at the time of making said statements and representations knew the same to be false or had reason to believe that the same were untrue, then, if you still further believe, from the evidence, that the defendant had already paid in cash and upon said note to the plaintiff all or more than said stock was fairly and reasonably worth at the time of the purchase thereof, and that as to the balance now remaining unpaid upon said note, the

23—Florence Cotton & Iron Co. v. Field, 104 Ala. 471, 16 So. 538. "These charges, said the court, in effect instructed the jury that the defendant must make good the release set up. The contract had been only partly performed, and money was due on it to plaintiff. Westmoreland v. Porter, 75 Ala. 460; Nesbitt v. McGee, 26 Ala. 748."

24—Ray v. Moore, 24 Ind. App. 480, 56 N. E. 937. "This instruction, tells the jury, in a manner unmistakably clear, that parties may enter into a valid contract, when the value of the consideration is indefinite, for the performance of one or several acts, and where love and kinship may have been a part of the consideration, and that courts and juries may have no right, in the absence of fraud, to overturn such a contract."

consideration for said note has failed, then you should find for the defendant.[25]

§ 628. **Promise upon Valuable Consideration from One Person to Another to Pay Third Person—Statute of Frauds.** The jury is instructed as a matter of law that a promise made upon a valuable consideration from one person to another to pay a sum of money to a third person is valid and binding, and can be enforced by said third person in his own name. In this case, if the jury believe, from the evidence, that the defendant, as charged in the declaration, purchased the leasehold and personal property in the restaurant from Y, and as a part of the purchase price agreed and undertook to pay the indebtedness due to C from Y, then the jury must find the issues for the plaintiff for the sum remaining unpaid or due at the time of making said agreement, and interest upon it at the rate of five per cent.[26]

25—Mayberry v. Rogers, 81 Ill. App. 581 (587).

The court said, "It is true that a vendor has a right to extol the value of his own property to the highest point his antagonist's credulity may bear. 'Ordinarily statements of an indefinite or general character made by either of the parties pending a negotiation for the sale of property relating to its cost or value, or offers made for it, and the like, will not in the absence of special circumstances afford any ground for avoiding the sale, although false and made with a fraudulent intent.' Dillman v. Nadelhoffer, 119 Ill. 567, 7 N. E. 88.

But it is also held in the same case that it is just as well settled that where the contracting parties for any cause are not on equal terms, and such representations are gross exaggeration resulting in an unconscionable bargain, the above rule will not apply.

Where the vendor and vendee are not contracting on an equal footing, and the latter is induced to purchase because of false statements of the former, the rule of caveat emptor has no application. Wannell v. Ken, 57 Mo. 478; 1 Bigelow on Frauds, 528.

We are of the opinion that there was no error in the instruction, and it was properly given."

26—Kee v. Cahill, 86 Ill. App. 561 (563).

"The case of Wilson v. Bevans, 58 Ill. 232, as to the question of the statute of frauds in the controlling facts, is precisely like the case at bar. As there stated: 'The appellant received the property contracted for, and it is wholly immaterial to him what direction was given to the purchase money. The vendor contracted to have it paid to his creditors instead of himself, and it impose no hardship upon the purchaser. It was his contract so to pay the purchase money, and such a contract is valid and binding in law, although it was not evidenced by any writing.' Under the facts as found by the jury, this language is directly in point, and is controlling. The Supreme Court in that case also states the general rule as to the statute of frands in this state clearly in these words: 'The general rule is that if the promise is in the nature of an original undertaking to pay a debt to a third party, and is founded on a valuable consideration received by the promisor himself, it is not within the provision of the statute and need not be in writing to make it valid and binding. It will be regarded in the light of a contract for the benefit of a third party, upon which said third party may found an action for the breach. The authorities all seem to agree in holding that such promise is not within the statute of frauds, and need not necessarily be in writing to make it valid.' The Bevans case is cited with approval as to this general rule in Meyer v. Hartman, 72 Ill. 444 and Borchsenius v. Canutson, 100 Ill. 82 (92).

It is also cited and is followed in

§ 629. Construction of Contracts for the Court. (a) It is the court that determines the construction of a contract. They do not state the rules and principles of law by which the jury are to be bound in construing the language which the parties have used in making the contract. They give to the jury as matters of law what the legal construction of the contract is, and this the jury are bound absolutely to take.[27]

(b) The court instructs the jury that what the terms of a contract are (if not in writing) is a question of fact for the jury, but its meaning and legal effect are questions of law for the court.[28]

§ 630. Construction, One of Law for the Court, but Latent Ambiguities May Be Submitted to the Jury. You are further instructed that all contracts, whether written or oral, that have been introduced in the case, are before you for your consideration and interpretation, together with the circumstances and surroundings of the parties, and it is for you to determine from all the circumstances and evidence of the case, the attitude and conduct of the parties, what was the real intention of the parties.[29]

§ 631. Legal Effect of Contracts—Meaning of Ambiguous Contract. (a) The court instructs the jury that while instructions should not assume the existence of facts, which must be found by the jury, still

Mathers v. Carter, 7 Ill. App. 225, and Cornell v. Central Electric Co., 61 Ill. App. 325."

27—Eyser v. Weissgerber, 2 Ia. 463; Lowry v. Megee, 52 Ind. 107; Kamphouse v. Gaffner, 73 Ill. 453; Curtis v. Martz, 14 Mich. 506; W. St. L. & P. Ry. Co. v. Jaggermon, 115 Ill. 407, 4 N. E. 641; Gage v. Meyers, 59 Mich. 300, 1 N. W. 921.

28—Goddard v. Foster, 17 Wall. 123; Thomas v. Thomas, 15 B. Mon. (Ky.) 178; Belden v. Woodmansee, 81 Ill. 25, 25 Am. Rep. 255; Lucas v. Snyder, 2 G. Gr. 499.

29—Carstens et al. v. Earles et al., 26 Wash. 676, 67 Pac. 404 (408).

"It is urged that the instruction is in violation of the rule that contracts are to be construed by the court. Such is undoubtedly the general rule where there are no ambiguities, no conflicting contracts, and where there are no questions of abrogation or rescission calling for an interpretation. But where there are disputes as to the intentions of the parties to the written agreement, and questions of rescission by disputed oral agreements, then the consideration of the written contract in connection with the oral contracts becomes a question for the jury. In Warner v. Miltenberger, 83 Am. Dec. 573, it is said: 'But, in our opinion, this question, as it arose in this case, was properly submitted to the jury. In support of this view we refer to the case of Wooster v. Butler, 13 Conn. 309, where the point was carefully examined, and decided in accordance with what we consider the weight of authority. That case involved the construction of a grant, and the court says: 'That the construction of written documents is a matter of law, and is not, in ordinary cases, to be submitted to the jury as a matter of fact, is true; but where the doubt is produced by the existence of collateral and extrinsic facts, not appearing upon the instrument, its consideration ceases to be a matter of mere legal construction, and the intention of the parties is to be sought for by a recurrence to the state of facts as they existed when the instrument was made, and to which the parties are to be presumed to have reference. The ambiguity in such case is a latent one, which may be explained by parol evidence, and submitted to the jury.' See, also, Ganson v. Madigan, 15 Wis. 144, 82 Am. Dec. 659; State v. Conklin, 34 Wis. 21."

it is proper for the court to direct the jury as to the legal effect of documentary evidence admitted.[30]

(b) The court instructs the jury that where a register's certificate of purchase was given in evidence, it was held proper to instruct the jury that the certificate was evidence of title in the person to whom it was issued, and that a judgment and execution against such person, together with a sheriff's deed thereunder, conveyed the title to the grantee therein. While instructions should not assume the existence of facts, still it is proper for the court to direct the jury as to the legal effect of the evidence admitted.[31]

(c) The court instructs the jury that if a contract is ambiguous in its terms it is the duty of the court to determine what it means from the evidence, and instruct the jury as to its meaning.[32]

§ 632. **Construction of Contract as to Delivery—Goods Damaged by Weather.** (a) This is a suit instituted by the plaintiffs against the defendants to recover the value of a large quantity of oats that were sold by the plaintiffs to the defendants under a written contract. It is the province of the court to construe that contract, and the court construes that contract to be this: That the plaintiffs in this case undertook to sell some oats to the defendants, to be delivered by a certain time, and they were to be of average Texas quality, and they were sold at a certain price—thirty-two cents a bushel—and were to be delivered at Pensacola, upon a wharf in Pensacola. Now, the court charges you, that if you believe that these oats that the plaintiffs did deliver upon a wharf in Pensacola within the time stipulated in this contract, and that they delivered it upon the wharf within the time, and that the oats were in good order, and that they delivered it when the weather was of such a character that the defendants could prevent that property from damage, it was their duty to have accepted, and, if they failed to accept, then they are responsible for the damage that occurred.

(b) You will determine from the evidence in this case whether the oats were delivered upon the wharf in Pensacola, and determine from the evidence, in accordance with the contract, whether they were delivered in such weather that the defendants in this case, by reason of diligence, could protect the oats from serious damage; and if you believe that they did, and delivered them in such quantity and manner upon the wharf that the defendants could by reasonable diligence have protected the oats from the weather or from damage, it was their duty to do so. If they failed to accept them, then they are responsible for the whole value of the oats; and if delivered in the proper kind of weather, they would be responsible for the damage,

30—Stribling v. Prettyman, 57 Ill. 371, 11 Am. Rep. 21; Hanson v. Eastman, 21 Minn. 509; Lowry v. Megee, 52 Ind. 107.

31—Stribling v. Prettyman, supra; State v. Delong, 12 Ia. 453.

32—Ogden v. Kirby, 79 Ill. 555; Stadden v. Hazzard, 37 Mich. 76; Am. Ins. Co. v. Butler, 70 Ind. 1.

if they could have protected them from damage. If, on the other hand, you believe that they were delivered on this wharf, and that the weather was of such a character that the defendants could not have protected them from damage, then they are not responsible, and they are only responsible for the quantity of oats they received. And you are the judges of how the question stands upon the evidence, and you are to determine it, according to the weight of the evidence and a preponderance of the evidence.[33]

§ 633. **Construction of Contract for Sinking a Well.** (a) The jury are instructed that the defendant was entitled to a well that would supply a reasonable and sufficient quantity of water for the wants and needs of himself and of a farm of that character in that neighborhood.

(b) Hence you must consider the condition of the parties and the circumstances surrounding the matter; the size of the farm; the probable needs of such a farm; the ordinary uses that a farm requires a well for in this neighborhood—to determine what was in the minds of the parties, what they contemplated when this well should be put there.

(c) As to the last proposition, as to whether or not the plaintiffs found a sufficiency of water—that is, made a well—evidence on the part of both parties, or, I might say, the evidence on the part of neither party, specifies specifically the quantity of water that should be found.

(d) This was an oral contract. I do not understand from the evidence that either party contends that any specific quantity of barrels per day or gallons per minute was to be the criterion of whether it was a good and sufficient well or not.[34]

§ 634. **Completion of Contract—Test of Work and Postponement of Trial of Machine, Construed.** (a) Under the contract between the parties by which the work and material to be performed and furnished by the plaintiff were performed and furnished, the time for the completion of the same was not expressed. It was therefore the duty of the plaintiff to perform his part of the contract in a reasonable time, as it was the duty of the defendant to be prepared to make the trial provided for in the contract within the time contemplated and understood by the parties, after the appliances were completed to the satisfaction of the plaintiff; that is, so that the plaintiff could properly say: "My work under the contract is fully performed. Nothing remains for me to do."

(b) If the defendant was not prepared to make the trial within the time contemplated by the parties, after the appliances were so completed, and by correspondence, letters and telegrams notified the plaintiff from time to time of such fact, and the plaintiff did not ob-

33—Heinberg et al. v. Cannon et al., 36 Fla. 601, 18 So. 714 (715).

34—These instructions were approved in Richison et al. v. Mead, 11 S. D. 639, 80 N. W. 131 (133).

ject to the postponement of the time for trial, but impliedly assented thereto, and when informed that the defendant was prepared, came on and made the trial and test without objection, then the fact, if it be a fact, that the trial was not made within two months after such appliances were completed, would not oblige the defendant to accept such appliances until after such trial had been made for such time as was contemplated by the contract.[35]

§ 635. **Changes Made at Plaintiff's Suggestion So as to Be Satisfactory, Construed.** So long as the appliances did not work to the plaintiff's satisfaction, and changes were made therein at his own suggestion, by lowering or raising the bridges in the melting furnace, by putting on a blow pipe, or by lowering the roof of the furnace in order to increase its capacity or its effectiveness, if you find that such changes were made by plaintiff, or by his direction, such appliances cannot be said to have been completed within the meaning of the terms of the contract between the parties.[36]

§ 636. **Written Contract Controls Verbal.** (a) The jury are instructed that where parties have had verbal negotiations, which have afterwards been reduced to writing, the law presumes that the entire agreement was reduced to writing, and that the written agreement will be taken to control, and as the final determination of the parties.

(b) The jury are instructed that if you believe that the settlement between plaintiff and defendant, was finally reduced to writing as alleged in plaintiff's reply, then you are instructed that the written contract is the best evidence of such agreement, and of the understanding of the parties, and in the absence of fraud or mistake, the parties are bound thereby. You should determine from all of the evidence before you whether or not the settlement was reduced to writing, and if you find that the same was reduced to writing, then such written contract was binding upon the parties thereto; that if you so find, then it will be your duty to determine whether or not the written contract or settlement covers the notes in controversy; and if you find said contract does not cover the notes in controversy your verdict should be for the plaintiff, unless you find from the evidence that after the execution of the written contract set forth in plaintiff's reply, there was a separate and independent verbal settlement of the notes in controversy by and between plaintiff and defendant, as set forth in the answer, and if you should so find your verdict should be for the defendant.[37]

§ 637. **Custom and Usage Enter Into and Form Part of a Contract.** (a) The court instructs the jury, as a matter of law, that when a contract is entered into, the parties are supposed to have reference to

35—Turner v. Muskegon Machine & Foundry Co., 97 Mich. 166, 56 N. W. 356 (358-9).

36—Turner v. Muskegon Machine & Foundry Co., 97 Mich. 166, 56 N. W. 356.

37—Martens v. Pittock, — Neb. —, 92 N. W. 1038 (1040).

the known usages and customs which enter into and govern the business or subject matter to which the contract relates, if there are any such usages and customs, unless such presumption is rebutted by the agreement itself.

Such customs as are universally known to exist, enter into and form a part of every contract to which they are applicable, although they are not mentioned or alluded to in the contract.[38]

(b) The court instructs the jury that although the usages of trade cannot be set up to contravene an established rule of law, or to vary the terms of an express contract, yet all contracts made in the ordinary course of business, without particular stipulations to the contrary, are presumed to be made in reference to the usages and customs of such trade, if any such exist.[39]

(c) The court instructs the jury that a usage of trade, in order to be binding upon the parties, must be generally known and established among those who are engaged in the business where the usage is claimed to exist, and so well settled and so uniformly acted upon as to raise a fair presumption that it was known to both the contracting parties, and that they contracted in reference to it, and in conformity to it.[40]

(d) The court instructs you, that a custom, to be binding as such, must be general and uniform in the place or in the branch of business where it is claimed to exist. It must be certain, reasonable, and sufficiently ancient to afford the presumption that it is generally known.[41]

§ 638. **Contract Against Public Policy Void—Limitation of the Rule—Bona Fide Purchaser.** If the contract of sale under which this property is claimed is void, it is because it is contrary to public policy. It is therefore subject to all the limitations which sound public policy may dictate; and courts will treat such contract in the manner which will be most consistent with sound public policy, and best calculated to suppress and discourage such violations of law. One qualification of the rule is that the rule itself shall not be made an engine of wrong and injury in the hands of a wrong-doer against an innocent party. It can never be good policy to punish the innocent for the crimes of the guilty. Hence the rule cannot be set up to the prejudice of any party innocent of all participation in the wrong, or whose rights have been acquired without notice of it; and it is a well-settled principle of law that where goods are obtained by fraud or under fraud, or under circumstances which would render the sale void be-

38—Page on Contracts, Vol. 2, Sec. 604; 2 Pars. on Cont., 537; Hughes v. Stanley, 45 Ia. 622; Page v. Cole, 120 Mass. 37; Carter v. Phila. Coal Co., 77 Penn. St. 286; Castleman v. S. M. Ins. Co., 14 Bush. (Ky.) 197.

39—Lonergan v. Stewart, 55 Ill. 44.

40—Lyon & Co. v. Culbertson, 83 Ill. 33, 25 Am. Rep. 349; Coffman et al. v. Campbell & Co., 87 Ill. 98; Couch v. The Watson Coal Co., 46 Ia. 17; Busch v. Pollock, 41 Mich. 64, 1 N. W. 921.

41—Leggat et al. v. Sands A. Co., 60 Ill. 158; Randall et al. v. Smith, 63 Me. 105.

tween the vendor and vendee, and the vendor has furnished, however innocently, to the vendee any of the evidences of ownership calculated to mislead a purchaser, and the goods are purchased *bona fide* from the fraudulent vendee, relying upon such evidences of ownership, such innocent purchaser will hold as against the original vendor.[42]

§ 639. Agreement for Dismissal of Criminal Prosecution Is Void. (a) You are instructed that any agreement that tends to stop or prevent a criminal prosecution, and thereby to interfere with the course of justice, is void; whether within the terms of the statute or not is against public policy and is void. And in this case, if the jury find from the evidence that the obligations sued on were signed under the agreement that the plaintiffs would not prosecute the maker's sons for the violation of the criminal statutes, state or federal, then and in that event their verdict should be for the defendant.

(b) You are instructed that, although you may believe from the evidence that B. Bros. were not guilty of any offense for which they could be punished criminally either under the federal or state statutes, and that the N. County Bank and B. Dry-Goods Co. did not intend to prosecute them criminally, yet, if you find that C. H., acting either as attorney or agent of the N. County Bank and B. Dry-Goods Co., represented to W. B., that if he signed the obligations sued on his sons, B. Bros., would not be prosecuted criminally, but if he did not sign the said obligations they would be criminally prosecuted, and you believe this was the consideration moving W. B., in the execution of said instruments, then in that event the said obligations are void, and your verdict should be for the defendant.

(c) If the jury find from the evidence that C. H. was the attorney or agent for the plaintiffs in these cases, then and in that event the plaintiffs will be bound by all the statements made by said C. H. at the time that said W. B. signed said obligations.[43]

42—Hutchins v. Weldin, 114 Ind. 80, 15 N. E. 804.

"This contract," said the court, "was contra bonos mores, and void as against public policy, citing Root v. Stevenson's Adm'r, 24 Ind. 115; Dumont v. Dufore, 27 Ind. 263; Davis v. Leonard, 69 Ind. 213.

Upon this point the court of its own motion charged the jury, in effect, that if they believed from the evidence that such contract was executed by the delivery of the mare to X after he had complied with the terms of plaintiff's proposal, 'the law, in such a case, will leave the parties just where it finds them. * * * If the contract has not been executed, it will not be enforced; if it has been executed, the law will not extend relief.' Where a contract, void as against sound morals or public policy, has been fully executed by both parties, and suit brought under, upon or against such contract, potior est conditio defendentis.' "

43—Dry-Goods Co. v. Barton, — Ark. —, 97 S. W. 58.

In comment the court said: "It is not necessary for a party to be under arrest and actually in the course of being prosecuted, in order to enable a party who secures the dismissal or termination of the prosecution, for a moneyed consideration to plead the illegality of such consideration in bar of its collection. Mr. Beach says:

§ 640. Contract to Testify for Compensation Held Unenforcible. The court instructs you that the law will not enforce an illegal contract, that is a contract made against the law, public policy or good morals, and if the jury believe from the evidence that plaintiff, ——, had a contract with the defendant by the terms of which said —— should testify as a witness for said X., and induce others to testify for said X., then the plaintiff ——— cannot recover in this case, because such a contract is illegal.[44]

§ 641. Gaming—Action for Money Lost. The court instructs the jury that betting upon a footrace between two persons is gaming within the meaning of the statute; that, in order for the plaintiff to recover under that statute he must show that he bet his money upon the race; that he lost his bet; and that the defendant, acting by himself or his agents, was the winner.[45]

§ 642. Contract Made on Sunday—Illinois. The court instructs the jury, that so far as the law is concerned, parties can make a valid contract as well on Sunday as on any other day. And, in this case, if the jury believe, from the evidence, that the parties did agree, the one to sell the corn and the other to purchase it, that contract would be binding upon both the parties, although they themselves may have supposed that to make the contract binding they would have to meet on some other day to ratify it.[46]

§ 643. Same Subject—Georgia—Iowa—Indiana. The court instructs the jury, that all contracts made in this state on Sunday, though not absolutely void, are voidable, and neither party can be bound to perform such a contract against his will.[47]

§ 644. Specific Contract Must Be Proved—Burden of Proof. (a) The defendants have undertaken to prove a specific contract, not in writing, under which the property referred to was delivered in full payment of all debts owing by A. to plaintiff; and, if they fail to

'A contract, the consideration of which, in whole or in part, is the suppression of a criminal prosecution, is without any legal efficacy, either as a cause of action or as a defense to an action not founded on or arising out of the agreement.' 2 Beach on Modern Contracts, Par. 1551; Page on Cont. Vol. 1, Sec. 417. Contracts to suppress evidence or in any way interfere with the course of justice whether within any terms of any statute or not are against public policy and void. Henderson v. Palmer, 22 Am. Rep. 117; Peed v. McKee, 42 Iowa 689, 20 Am. Rep. 631. A note or agreement where the consideration is the prevention or dismissal of a prosecution is void, even though the amount represents a debt due the payee. Citing Rogers v. Blythe, 51 Ark. 519, 11 S. W. 822; Kirkland v. Benjamin, 67 Ark. 480, 55 S. W. 840."

44—Boehmer v. Foval, 55 Ill. App. 71 (73).

45—Jones v. Cavanaugh, 149 Mass. 124, 21 N. E. 306. Citing Grace v. McElroy, 1 Allen 563; Scollans v. Flynn, 120 Mass. 273; McGrath v. Kennedy, 15 R. I. 209, 2 Atl. Rep. 438.

46—Moore et al. v. Murdock et al., 26 Cal. 514, 85 Am. Dec. 187; Richmond v. Moore, 107 Ill. 429, 47 Am. Rep. 445.

47—Meriwether v. Smith, 44 Ga. 541; Pike v. King, 16 Ia. 49; Peake v. Conlan, 43 Ia. 297; 2 Pars. on Cont. 757; Page on Cont. Sec. 455; Gilbert v. Vachon, 69 Ind. 372.

show this specific contract by a fair preponderance of evidence, then your verdict must be for the plaintiff.[48]

(b) It is for the plaintiff to prove, by a preponderance of the evidence, that there was a contract existing between the plaintiff and the defendant, as claimed by the plaintiff, and, unless you believe from a preponderance of the evidence that the plaintiff has proven that on the ————, there was such a contract in effect, it will be your duty to find for the defendant.[49]

§ 645. **Agreement to Purchase Stock.** The court instructs the jury that the plaintiff in this case sues in the place and stead, and for the benefit of A. E. ——, and in order to recover, he must prove by a preponderance of the evidence an agreement on the part of the defendant to purchase certain shares of stock in the O. C. Co. from A. E. ——, or to pay that company for certain stock purchased by it for him. And if you believe from all the evidence in the case that the defendant did not so agree with A. E. ——, then your verdict should be for the defendant.[50]

§ 646. **Entering upon the Performance of Offer Shows Acceptance.** You are instructed, that if one person makes a proposition to another, and the latter, without any formal acceptance of the proposition, enters upon the performance of it, and proceeds to avail himself of its benefits, he will be as fully bound as if he had in terms accepted the offer.[51]

§ 647. **Liability on Agreement to Pay for Merchandise Delivered to Third Person.** (a) If you believe, from the evidence, that plaintiff and defendant entered into an agreement, under which plaintiff agreed to furnish lumber on the order of T., to be used in erecting a building for the defendant, and defendant agreed with plaintiff to pay him for the lumber, and that in pursuance of such agreement plaintiff furnished lumber, then plaintiff would be entitled to recover.

48—National State Bank v. Delahaye, 82 Ia. 34, 47 N. W. 999 (1001), 31 Am. St. Rep. 458.

49—Utter v. Buck, 120 Ill. App. 120. Under the facts in the case at bar the above instruction was held erroneous. However in an action upon an express contract solely the form would be proper.

50—Royal Trust Co. v. Overstrom, 120 Ill. App. 479.

The court said: "We do not think this instruction is erroneous. It might perhaps have been more carefully drawn to avoid any possibility of its proving misleading, but we do not think that in its fair meaning, as it must be supposed it was probably understood by the jury, it declares either that Mr. B.s' agreement on behalf of the company would not bind the company, or that an agreement could not be by the jury inferred from all the facts and circumstances testified to surrounding the purchase of the stock and its delivery to A., if they thought such facts and circumstances as they believed took place justified such an inference. The language of Judge Wall in the City of Champaign v. Forrester, 29 Ill. App. 120, cited in the brief for defendant in error, seems very applicable here. 'Possibly the jury, on a careless reading, might give it the construction contended for; and if the defendant was apprehensive that the jury might so misunderstand, it was its privilege to ask another instruction, making the point clear.' "

51—Miller v. Manis, 57 Ill. 126.

(b) The jury are instructed, that if you find, from the evidence in this case, that T. had contracted with defendant to build a house for him, and to furnish all the materials therefor, including the lumber, and that T. gave the order introduced in evidence, on the defendant, payable to plaintiff, after the purchase of the lumber involved in this suit, and that such lumber was purchased of the plaintiff by T., and not by the defendant, and that the defendant did not agree to pay for the same, then he, and not the defendant, H., is liable therefor, and you should find for the defendant.[52]

§ 648. **Third Person Can Sue on Contract Made for His Benefit.** The jury are instructed, as a matter of law, that a promise made upon a valuable consideration, from one person to another, to pay a sum of money to a third person, is valid and binding and can be enforced by said third person in his own name. In this case, if the jury believe, from the evidence, that the defendants, as charged in the declaration, purchased the leasehold and personal property in the restaurant from C. & Y., and as a part of the purchase price therefor agreed and undertook to pay the indebtedness due to D. C. from the firm of C. & Y., then the jury must find the issues for the plaintiff for the sum remaining unpaid or due at the time of making the said agreement, and the interest upon it at the rate of five per cent.[53]

§ 649. **Claim to Recover from Estate for Taking Care of Deceased.** (a) I charge you further, if L. S. and defendant's wife and Mrs. B. agreed with the defendant that out of the estate of J. S. payment was to be made for the expense and trouble of waiting on J. S., if defendant had any such expense or trouble, then defendant had the right to take out of their part of the estate of J. S. payment for such trouble and expense in waiting on him, if he incurred any trouble and expense in waiting on him. If you believe these sisters agreed with defendant that out of the estate payment was to be made for any trouble and expense in waiting on J. S., then you will determine whether or not defendant incurred any expense and trouble in waiting on said J. S.; and, if so, what said trouble and expense was reasonably worth.

(b) I charge you that if these sisters agreed that out of the estate of J. S. payment was to be made if defendant incurred any expense and trouble, then you will deduct from the estate of J. S. what said trouble was reasonably worth, and what said expenses were, and then determine, under the rules of law given you in charge by the court, whether or not defendant is liable to plaintiff for one-third of said balance of said estate, if he received any part of it belonging to L. S.

(c) I charge you further, if these sisters did not agree with defendant that out of the estate of J. S. payment was to be made for

52—Hartshorn v. Byrne, 147 Ill. 418 (425), 35 N. E. 622.

53—Boldenwick et al. v. Cahill, 187 Ill. 218 (219), 58 N. E. 351.

such expenses and trouble, or if such agreement was made, but defendant did not incur any trouble and expense in waiting on J. S., and if defendant reserved any part of said estate belonging to L. S., then you will determine, under the rules given you in charge by the court, whether or not defendant is liable for such part, without deducting anything for such trouble and expense, if it was incurred by defendant.[54]

§ 650. Rescinding by Mutual Consent. The jury are instructed, that all contracts may be rescinded by the consent of all the contracting parties, and this consent need not always be expressed in words. If either party, without right, claims to rescind the contract, the other party need not object; and if he permit it to be rescinded, it will be done by mutual consent.[55]

§ 651. Rescinding for Non-Performance. The jury are instructed, that when one party fails or refuses to perform his part of the contract, with an intention to abandon it, or disables himself from performing it, the other party may treat the contract as rescinded.[56]

The court instructs you, as a matter of law, that a contract cannot be rescinded by one of the parties alone, for non-performance by the other, unless both can be restored to the condition in which they were before the contract was made; and if one of the parties has derived any advantage from a partial performance by the other, he cannot hold the benefit of this and rescind as to the residue, on the ground of the other's non-performance.[57]

§ 652. Parol Agreement Avoiding Contract—Burden of Proof. You are instructed that where it has been once established that there has been a contract of agreement between two or more individuals, and the same is sought to be avoided by any parol agreement, that

54—Teasley et al. v. Bradley et al., 120 Ga. 373, 47 S. E. 925 (926). "This charge was adjusted to the pleadings in the case. In the amendment to his plea T. alleged that prior to the death of J. S., and when he returned to defendant's home to be taken care of in 1873, there was an agreement between defendant and the children of J. S. that, in consideration of defendant taking care of said J. S. and nursing him while he lived, they would wind up J. S.'s estate without administration, and that defendant was to be fully paid for his services and the expenses incurred by him in pursuance of the contract, which amounted to the sum of $1,000, one-third of which sum was properly chargeable to L. S. The amendment did not state the names of the children of J. S. The evidence disclosed that at that time there were three in life, and the judge in his charge gave the names of these children, one of whom was Mrs. B., and in effect instructed the jury that, if the contract set up in the amendment plea was sustained by proof, then L. S. would be chargeable with her share of the expenses incurred in pursuance of that contract. There was nothing in the pleading which set up a contract between L. S. and T.'s wife. The allegation was that all of the children should pay the defendant for his trouble and expenses, and the charge of the court was adjusted to the pleadings, and was free from error."

55—2 Par. on Cont. 678; Page on Cont. Sec. 317.

56—Page on Cont. Sec. 1434; 2 Par. on Cont. 678.

57—2 Par. on Cont. 679.

the written agreement is the best evidence, unless the parol shall be established by a preponderance of the evidence satisfactory to your minds, and that in a case where there is a dispute respecting the change of a written agreement, and you are in doubt regarding the truth, that the burden of proof to establish the change from the written agreement to the oral agreement is upon the person who sets up the oral agreement to defeat the written agreement.[58]

§ 653. **Failure of One to Perform Entitling the Other to Abandon Contract—When.** The court instructs the jury that under the contract in evidence, even if you believe from the evidence that accidents happened whereby defendant's light was affected, or even if you believe from the evidence said light became defective without apparent cause, it was the duty of defendant to notify plaintiff at its power house or office of such accident or defective light, and to give plaintiff a reasonable time to repair such accident or remedy such defect; and defendant had no right under said contract to rescind or annul the same because of such accident or defective service unless you believe from the evidence that such accident happened, or the said light became defective, and plaintiff after reasonable notice neglected or refused to repair such accident or remedy such defect in said light.[59]

§ 654. **A Party Cannot Recover Money Paid Where He Himself Refuses to Perform, in the Absence of Fraud.** The jury are instructed, as a general principle of law, that a party cannot recover back any money paid by him upon a contract which he himself has refused to perform without fraud of the other party thereto. And in this case, if the jury find from the evidence that the defendant was ready and willing and offered to perform the contract in evidence on his part, and that the plaintiff refused to execute and perform said contract on his part, then the plaintiff is not entitled to recover any portion of the money paid by him upon said contract.[60]

§ 655. **Releasing Plaintiff from Complete Compliance—Agreeing to Pay for Work Actually Done.** If the jury believe from all the evidence that defendants did not revoke the contract in evidence, but re-

58—Carstens v. Earles, 26 Wash. 676, 67 Pac. 404 (407).

"While the words used may not be the most comprehensive that might have been used, yet, we think," said the court, "from the context, that the instruction, as a whole, is the equivalent of saying that when the existence of the written agreement is established, and when it is sought to be avoided by oral evidence, certain stated rules of evidence must apply."

59—Bloomington Elec. Light Co. v. Rodbourn, 56 Ill. App. 165 (172).

The court said, "It is not every failure, neglect or refusal of one party to comply with some of the terms of a contract which will entitle the other to abandon it, upon notice to the delinquent or by any other means he can use. To justify an abandonment, the failure must be total, that is, such as to defeat the object of the contract or make it unattainable, citing Selby v. Hutchin, 4 Gilm. 319; Doggett v. Brown, 28 Ill. 495."

60—Kendall v. Young, 141 Ill. 188 (192), 30 N. E. 538, 16 L. R. A. 492.

leased the plaintiffs from a complete compliance with said contract, and agreed to pay plaintiffs whatever was due for work and labor actually performed; and if the jury further believe from all the evidence that there is a balance due and unpaid for work and labor actually performed, they should find for the plaintiffs for said balance with interest from time it was due.[61]

§ 656. **Only Act of God, or Public Enemies, Will Excuse Non-Performance—What an Act of God.** The court instructs the jury, that where a person makes a contract to do a thing which is in itself possible to be done, he will be liable for a breach of such contract, notwithstanding it was beyond his power to perform it.[62]

The jury are instructed, that to make an act of God an excuse for not performing a covenant, or for not complying with the terms of a contract, performance must be impossible by or through any known exercise of human skill or power—something must occur which no ordinary skill or precaution could have foreseen or prevented.[63]

§ 657. **Unforeseen Contingencies, Sickness, Bad Weather or Roads, No Excuse.** The court instructs you, as a matter of law, that where a person contracts to sell stock (grain or other personal property), and deliver the same at a specified place, upon a specified day, inclemency of the weather, bad condition of the roads, sickness, or other unforeseen contingency, furnishes no excuse for the non-performance of the contract, unless it be expressly so provided in the contract.[64]

§ 658. **Notice to Rescind—Reasonable Time After Discovery of Fact, Giving Right to Rescind.** The court instructs the jury that in this case, whether the defendant gave the plaintiff notice of his intention to rescind the contract in question, and whether such notice was given as soon as it could reasonably be done after the alleged discovery of the fact, relied upon as giving the right to rescind, are questions of fact to be determined by the jury from the evidence in the case.[65]

§ 659. **Release Obtained by Fraud.** (a) The jury are instructed that if you believe, from the evidence, that the release in this case was procured from the plaintiff by the defendant, or by anyone for it, and that at the time the plaintiff signed the said paper he believed from what was told him before signing it that it was for the purpose of securing the services of a physician, and that the parties who induced him to sign said paper led the plaintiff to believe that he was only signing a paper for the purpose of securing the services of a physician, and that the plaintiff did so believe, you are instructed that a release so procured would not be binding upon the plaintiff and should not be considered by you in arriving at your verdict.

61—Andrews et al. v. Tucker et al., 127 Ala. 602, 29 So. 34 (37).

62—Walker v. Tucker, 70 Ill. 527.

63—Shear v. Wright, 60 Mich. 159, 26 N. W. 871.

64—Kritzinger v. Sanborn, 70 Ill. 146.

65—Parmlee v. Adolph, 28 Ohio St. 10; Byers v. Chapin, 28 Ohio St. 300.

(b) You are instructed that it is for the jury to determine, from all the evidence and circumstances in the case, whether the plaintiff understood the contents of the release at the time he signed it, and whether he intended to release and understood that he was releasing his claim and right of action against the defendant in consideration of the defendant furnishing him with a doctor; and unless you so believe you are instructed that it would not release the defendant from liability, if you further find, from the evidence, that the defendant is liable, and such release should be disregarded by you in arriving at your verdict.[66]

§ 660. **Revocation of Contract with Attorney to Represent an Heir on a Contingent Basis—Series.** (a) If the jury believe from the evidence that the defendant contracted with the plaintiff as an attorney at law, to pay him 20 per cent. of her interest in the estate of M. J. G., in case he should establish her right thereto, and recover same for her, and, by power of attorney, constituted and appointed plaintiff her agent and attorney to procure such interest, and also agreed to pay him $100 for his services in making search for defendant and proving her identity and establishing her to be an heir of deceased, and also promised to reimburse plaintiff for all sums expended by him in finding her and all sums expended in her interest, and if the jury further believe from the evidence that the plaintiff did make such search, locate and develop defendant to be the daughter and heir of the deceased, and entitled to share in her estate, and if then the plaintiff while he was taking all necessary steps in her behalf towards a recovery of her interest in said estate was prevented by defendant from doing so by revoking his employment as such attorney, then plaintiff is entitled to a verdict in his favor for all sums expended by him and which she agreed to repay, and also the sum of $100 for his services in making search for defendant and showing her to be an heir of deceased, and is also entitled to recover damages for a breach of his contract of employment in any sum which the jury may feel warranted from the evidence in awarding to him, not exceeding $1,000. And in arriving at such verdict the jury may take into consideration the value of the estate of deceased, as it may have been proven in evidence.

(b) If you find from a preponderance of the evidence that defendant did enter into a contract with plaintiff to pay him the sums of money expended by him in finding her, and a $100 fee for his services in that connection, and the further sum of 20 per cent of

66—Pioneer C. Co. v. Romanowicz, 186 Ill. 9 (14), aff'g 85 Ill. App. 407, 57 N. E. 864. The court said that while these instructions "might have been given in better form they are within the rule pronounced in National Syrup Co. v. Carlson, 47 Ill. App. 178, and reported in this court in 155 Ill. 210, 40 N. E. 492. In that case, the Appellate Court said that a release may be regarded as not fairly obtained, and hence as inoperative, where it is taken from one unable to read the language, and is not read over to him, and he is made to believe that it is a paper for some other purpose."

any share of her mother's estate which he might recover for her, and if you further find that said contract was made in good faith, and not procured by fraud, misrepresentation, or concealment of material facts on the part of the plaintiff, and that afterwards the defendant revoked the power of attorney executed by her to plaintiff, then it is for you to say whether such revocation was intended by her and understood by him as dismissing him from the case, and denying him the right to proceed and carry out his part of the contract; if you should find that it was so intended and so understood by both parties, then you should find for plaintiff such sum in damages as you believe he is entitled to recover under the other instructions given herein.

(c) If you find that the agreement about which plaintiff testified was voluntarily entered into by the defendant then the burden of showing that her consent to the same was procured by misrepresentation or concealment of material facts amounting to a fraud is upon the defendant.

(d) The burden is on the plaintiff to show by a preponderance of the evidence that the defendant entered into the contract with him on which this action is based and for the breach of which he asks for damages.

(e) Attorneys, in dealing with their clients, are required to exercise the highest order of good faith and to disclose to them all information in their possession as to the material facts of the case which would or might influence the client in entering into or refusing to execute the contract in the issue.

(f) The court instructs the jury, if they believe from the evidence that the plaintiff is entitled to recover, the measure of damages is the amount of money he would have received had he been allowed to complete the performance of his contract, less the value of such services as he would have been required to render, and also deducting any expense which he would have been compelled to incur in carrying out the contract on his part.[67]

§ 661. Plaintiff Ready and Willing to Receive Subject Matter—Damages. If you believe, from the evidence, that the defendant made with the plaintiff such a contract for the delivery of grain, as is set forth in either of the counts of the plaintiff's declaration, and that the plaintiff was ready and willing to receive such grain and pay for the same, as stated and alleged in such count; and if you further believe, from the evidence, that the defendant failed to perform his

67—Weil v. Fineran, 78 Ark. 87, 93 S. W. 568.

The court said, "These instructions properly presented the law applicable to the issue and the facts in evidence. Citing Brodie v. Watkins & wife, 33 Ark. 545, 34 Am. Rep. 49. See also, Van Winkle v. Satterfield, 58 Ark. 621, 25 S. W. 1113, 23 L. R. A. 853, on the issue of the breach of contract, and the measure of damages therefor. See Brodie v. Watkins & wife, supra, and Davis v. Webber, 66 Ark. 190, 49 S. W. 822. 45 L. R. A. 196, 74 Am. St. Rep. 81 and Thweatt v. Freeman, 73 Ark. 575, 84 S. W. 720, on the question of the duty of good faith from the attorney to his client."

part of the contract, as alleged in the same count of the declaration, without fault on the part of the plaintiff, then the defendant is liable in damages for such breach of the contract on his part, if any damages have been thereby sustained by the plaintiff.

And, in such case, the measure of damages is the difference between the contract price and the market value of the same grain at the time and place where it should have been delivered under the contract.[68]

§ 662. **Failure to Accept, Diminished Profits No Excuse.** You are instructed that, if the failure of the defendant to take so much as ——— ——— tons of ground flint per year was because the defendant was unwilling to sell at a smaller profit than he had been getting before that time, then the diminished profits furnish no excuse for said failure, if the jury should be of opinion that he could still have sold the goods by accepting smaller profits.[69]

§ 663. **Failure of Title as a Breach of Contract.** (a) The jury are instructed that if you believe from the evidence that the title transferred to G., as stated in defendant's answer, failed by reason of chattel mortgage given on said property by one S after the date of the sale described in defendant's answer, then you are instructed, that such failure comes within the breach described in defendant's answer; and, if you so find the facts to be, you should find for the plaintiffs.

(b) The jury are instructed that if you believe from the evidence that H. & Co., prior to the time that the defendant purchased the goods in question, had a claim against one S., and that the only part that H. & Co., took or had in the sale in question was for the better securing an indebtedness due them, and that at said time the real title to such property was in said S., then you are instructed that the failure of said title at any subsequent time is not chargeable to this plaintiff, and you should find for the plaintiff.[70]

§ 664. **Breach of Contract for Sale of Good Will of Business—Elements that Must Be Proved.** (a) The burden of proof is on the plaintiff in this case and before he can recover he must prove by a preponderance of the evidence the following propositions: 1. That the alleged contract set up in his petition was signed at or about the time therein mentioned. 2. That a part of the $——— given by plaintiff to defendant was in consideration of defendant not again engaging in the bakery business in N. City, while the plaintiff was engaged in that business. 3. That defendant has engaged in the bakery business again in competition with plaintiff. 4. That plain-

68—Metz v. Albrecht, 52 Ill. 491.

69—Moses v. Allen, 91 Md. 42, 46 Atl. 323 (325).

70—Hartwig v. Gordon, 37 Neb. 65, 56 N. W. 324.

The court said: "These instructions should have been given. This was the plaintiff's theory of the case, as presented by his pleadings and proof, and he had a right to have the case, as presented by him, submitted to the jury."

tiff has been damaged in his business by reason of defendant engaging in the bakery business. 5. The amount of damages that plaintiff has sustained, if any.[71]

(b) The court instructs the jury that the language of the contract, to-wit: "The said A. agrees to relinquish his office for the practice of medicine and surgery to the said Dr. W., party of the second part," simply means that he was to vacate said office and leave the same to the use of the defendant Dr. W., if he chose to occupy it, and if the jury believe from the evidence that said A. was able, ready and willing to so relinquish, then the law is for the plaintiff, and the jury will so find.[72]

§ 665. **Defective Machinery—Reasonable Time to Fix.** If you find that the defendant first notified the agent, ———, in ———, that he was about to start his machine, and that in response to such notice a man was sent out by the plaintiff to assist in starting the machine, and that thereafter the machine did not work well, and the defendant notified the agent, ———, of that fact, and requested him to send an expert to fix it, he was bound to allow the plaintiff a reasonable length of time to get the expert out to his farm, and give him a reasonable opportunity to fix the machine.[73]

§ 666. **Irrigation Contract, Breach of—Damages—Public Utility Corporations.** (a) It is provided by the contracts introduced in evidence that a failure on the part of the plaintiff to furnish defendants water to irrigate their rice crop, as provided for in said contract, in no event should render plaintiff liable for any sum of money in excess of $4 per acre for such of said land as it failed to water; and also that, should enough rice be raised by defendants to reimburse them for their actual outlay, then the plaintiff should not be liable for any sum whatever.

(b) You are instructed that at the time of the making and signing of said contract it was the right of the plaintiff and defendant to enter into a contract under which it should furnish defendants water, and that it was the right of the plaintiff to insert therein reasonable conditions and restrictions, but that it had no right to demand unreasonable conditions or limitations. Therefore, if you find from all the facts and circumstances existing at the time of the execution of said contracts that said provision in said contract was reasonable, then, in that case, if you so find, you are instructed that it is valid and binding on the defendants, and, if you so find, you are instructed that, if the defendants were damaged by the negligence of plaintiff as alleged, but they made rice enough on the land to reimburse them for their actual outlay, then and in that case defendants would

71—Hauber v. Leibold, — Neb. —, 107 N. W. 1042.

72—Wallingford v. Aitkins, 24 Ky. 1995, 72 S. W. 794 (795).

73—McCormick Harv. Mach. Co. v. Volkert, 81 Minn. 434, 84 N. W. 325.

The court said: "This instruction was clear and concise, and it was error to refuse it."

not be entitled to recover on their cross-bill; and, further, if you should find that defendants were damaged by the negligence of plaintiffs as alleged in their cross-bill, and that they did not raise rice enough on the lands to reimburse them in their actual outlay, then you are instructed that their measure of damage under said contract could not exceed the sum of $4 per acre on such number of acres of land as the plaintiff failed to furnish water in its lateral in sufficient quantities to irrigate their crop, as provided in said contract.

(c) But you are also instructed, in this connection, that should you believe and find, from all the facts and circumstances in evidence, that at the time of the making of said contract the paragraph of the contract above quoted was an unreasonable condition or provision under the conditions then existing, then, and in that case, if you so find, you are instructed that, if you find for defendants on their cross-bill, you will ignore said provision in said contract in assessing the defendant's damages, if any you find, and in such case, if you find for the defendants, you will find for them the difference between the market value of the crop when matured that they would have made (if there be any difference, and that they did make, if there was any difference) and you will deduct from this amount, if any you find, such sums of money that the defendants would have had to expend, that they did not expend, in maturing, harvesting, threshing, and placing the said crop on market, and also deduct such damages as would have likely been occasioned by the weather and climate conditions, as existed in the season of 1904, and such losses as would have been occasioned in the handling and threshing.[74]

74—Col. Canal Co. v. McFarland and S., — Tex. Civ. App. —, 94 S. W. 403.

"We have no doubt," said the court, "that the reasonableness of a contract such as the one under consideration, when the question is properly raised, may be inquired into.

The parties, being competent to contract, must be governed by the terms and stipulations agreed upon and evidenced by their contract; and that, unless the appellant is of the class of quasi public corporations upon whom is conferred the right to exercise the power of eminent domain, or vested with some other extraordinary privilege, it can impose by contract such terms and conditions as it may see fit. But appellant does not belong to that class of corporations vested with the power of eminent domain, Borden v. Trespalacious Rice Irr. Co., — Tex. Civ. App. —, 82 S. W. 461; id. — Tex. Sup. —, 86 S. W. 11. This power can only be granted for a public use, and when it is conferred by law, as in this state to irrigation companies, upon a corporation, its status and quasi public is fixed, regardless of whether it exercises the power or not. It can no more escape its duty to the public, because it has not exercised such power, than a railway company who has purchased its right of way instead of exercising its power to acquire it by condemnation proceedings. In Long on Irrigation, par. 130, it is said: 'Irrigation companies furnishing water to consumers for compensation, although private corporations, are public or quasi-public carriers of water, charged with a public duty or trust.' It seems to us that this is applicable to such companies incorporated under the laws of this state, and that, whatever their liability may be to the public, they cannot limit it by con-

§ 667. **Plaintiff Must Show Readiness to Perform.** The court instructs the jury, as a matter of law, that in a suit by a purchaser of articles of personal property, to be delivered to him at a certain time and place, in order to recover damages for non-delivery, it is necessary for the plaintiff to prove that he was ready and willing to receive and pay for the same at such time and place.[75]

§ 668. **Defense of Payment—Set-Off—Burden of Proof.** (a) You observe that the defendants do not deny but that the plaintiff did sell the number of brick claimed, and at the price claimed, to the defendant ———; hence the plaintiff will be entitled to recover therefor from him, unless ——— has proven his defense of payment.[76]

(b) The court charges the jury that the burden of proof is upon the defendant to establish his set-off.[77]

(c) The burden of showing the ——— mortgage given by the defendant to the plaintiff as trustee was a payment in full of the entire amount due under the judgment against the defendant is upon the defendant, and he must satisfy you, by a fair preponderance of the evidence, that the giving and acceptance of such mortgage constituted a payment in full of the ——— dollars sued for in this action.[78]

§ 669. **Retention of Money Under an Agreement Would Amount to a Payment of the Indebtedness.** The court instructs the jury that if from the evidence they should believe that the saloon property and the accounts belonged to T. at the time of his death, and that there was an agreement between the plaintiff and defendant, as administrator, of the estate of T., deceased, that the effects of T. in plaintiff's hands, and the proceeds thereof, collected and to be collected by plaintiff, should be applied to the payment of the note, and they should further find that plaintiff did have in his hands effects of

tract, and that such attempted limitation should be deemed unreasonable and held void. Such corporations must be held to the discharge of their duties to the public, and they cannot escape or avoid the consequences of their failure to perform them by limiting their liability by contract. Otherwise, they could place the public, whose servants they are, at their mercy. In performing their duty to the public, they cannot discriminate in favor of or against any of its members entitled to their service. While they must treat all alike, they must faithfully, in so far as they can by the exercise of ordinary care and diligence, discharge their duty to all. If such a company treats wrong alike, all the members of the public entitled to its service, it is certainly liable to each for the consequences of such wrongful treatment. It cannot be heard to say in defense of an action by one for damages occasioned by such treatment: 'I treated him just as I did all of my customers'—for a multiplicity of wrongs do not justify a single one."

75—Kritzinger v. Sanborn, 70 Ill. 146.

76—Fleming v. Stearns, 79 Iowa 256, 44 N. W. 376 (377).

77—O'Neal v. Curry, 134 Ala. 216, 32 S. 696 (698), 92 Am. St. Rep. 22. "There was no error in this charge, requested and given at the request of the plaintiff. Cook v. Malone, 128 Ala. 662, 29 So. 653."

78—Meyer v. Hafemeister, 119 Wis. 539, 97 N. W. 165, 100 Am. St. Rep. 900.

T.'s estate, and that pursuant to such agreement he received, as the proceeds of the sale of the property, and collections of said amounts, money sufficient to pay said note, then such receipt and retention of the money under such agreement would amount to the payment of a note.[79]

§ 670. Action for Money Loaned—Partial Payments—Statute of Limitations. (a) The court instructs the jury that if they find from the evidence that the plaintiff did advance and loan to the defendant the money or moneys as claimed by her and that no part of the same has been repaid, then their verdict must be for the plaintiff; but if the jury find from the evidence that the plaintiff has received partial payments on account of said loan, then the amount of such payments must be deducted from the amount claimed by plaintiff by the jury in rendering their verdict; but, if the jury find from the evidence that the plaintiff has been wholly repaid, then their verdict must be for the defendant.

(b) The court instructs the jury that if they find from the evidence that the plaintiff loaned to the defendant the amount claimed, or any other sum, at the time mentioned in the evidence, that for a period of more than five years before the institution of this suit on ——— ———, no payment was made by defendant, or any one for him, on account of said loan, or in recognition of a valid and existing claim, but that all of the payments made by the defendant to the plaintiff within said period of five years were made by defendant, as free and voluntary gifts, and not in payment or recognition of said loan, then and in that event the verdict must be for the defendant.[80]

§ 671. Wrongful Delay in Payment—Money Withheld Unreasonably—Demand of—Interest Allowed. (a) The court instructs you that if you find from the evidence and under the instructions of the court, that the plaintiffs are entitled to recover from the defendant, and if you find from the evidence that such money as you find the plaintiffs are entitled to, if any, was withheld by an unreasonable and vexatious delay of payment, then you may allow the plaintiffs interest at the rate of five per centum per annum on such sum, if any, as you believe from the evidence and under the instructions of the court, the plaintiffs are entitled to recover from the defendant from the date the same became payable, as may be shown by the evidence in the case. What the facts are you must determine from the evidence.[81]

79—Frank v. Thompson, 105 Ala. 211, 16 So. 634 (635).

80—Stephan v. Metzger, 95 Mo. 609, 69 S. W. 625 (627).

81—Fitzgerald v. Benner, 219 Ill. 490, 76 N. E. 709.

"The evidence tended to show an unreasonable and vexatious delay of payment, and it was for the jury to say whether that delay was occasioned by the fault of the appellant. The delay of the architect was the delay of the appellant, as the architect was to a certain extent the agent of the appellant, and, according to the

(b) The court instructs you that even if you should find for the plaintiff you should not allow him interest on the amount claimed by him, unless you believe, from a preponderance of all the evidence in the case, that the defendant has withheld money from the plaintiff by an unreasonable and vexatious delay on his part.[82]

(c) The court instructs the jury that the plaintiff is not entitled to recover interest for any loans or advances made to defendant unless it appears from the evidence that a demand for payment of such loans or advances was made on the defendant by the plaintiff, and then only from the date of such demand.[83]

§ 672. **Application of Money to One Demand Instead of Another.** I charge you that you are not to consider the question as to whether any payment made by defendant to plaintiff was wrongfully applied to any one demand of the plaintiff against the defendant rather than to another demand. Such question is not raised by the pleadings in this case. But in the consideration of any payment made by defendant to the plaintiff, you are to inquire only whether the demand to which it may have been applied was correct, just, and due at the time of said payment.[84]

§ 673. **Settlement of Prior Suit.** You are instructed that, if you find, from the evidence, that the plaintiff herein instituted a suit against ——— for the purpose of recovering the $——— involved in this suit now before you, and that she made a settlement of this case with the defendant therein or anyone else, that the plaintiff is barred from the further prosecution of this suit, and the verdict of the jury must be for the defendant.[85]

§ 674. **What Would Constitute a Valid Settlement—What Would Be Insufficient.** If you find from the evidence that these parties in an effort to adjust their matters met together, and went over their claims and agreed upon the terms of their contract, and what was included within the contract, then the agreement would be binding on them, but if they met for the purpose of an adjustment and made concession, not because they admitted the contract required the concessions, but in order to reach a settlement of their matters, and a settlement was not consummated, then concessions made under those circumstances would not be binding upon either party to the case.[86]

testimony of the appellees, acted under the instructions of the appellant in refusing to deliver the certificate. The instruction is not justly subject to the criticism, that it leaves the jury to estimate the amount of damages according to their own individual notions of right and wrong, because it specifically refers them to the evidence under the instructions of the court, citing Springfield C. R. Co. v. Puntenney, 200 Ill. 9," 65 N. E. 442.

82—Barron v. Burke, 82 Ill. App. 116 (118).

83—Stephan v. Metzger, 95 Mo. 609, 69 S. W. 625 (627).

84—Schmidt v. Mitchell, 117 Ga. 6, 43 S. E. 371 (373).

85—Jacob v. Marks, 183 Ill. 533, aff'g 83 Ill. App. 156, 56 N. E. 154.

86—Rikerd Lumber Co. v. Hoertz & Son, 146 Mich. 386, 109 N. W. 664.

§ 675. **Payment Made in Settlement of a Disputed Claim Will Operate as a Release if Retained.** (a) The jury are instructed that if the check for $——— and three notes introduced in evidence were sent to the plaintiffs by the defendants at the same time and as a part of one transaction, as a final settlement of an honestly disputed claim between the plaintiffs and the defendants, then the plaintiffs, as a matter of law, were not entitled to receive and appropriate the check and collect the amount thereof and return the notes; that a tender of such an amount must be accepted as a whole, or not at all; and if the return of the notes was not acquiesced in by the defendants, but they have been tendered back by the defendants to the plaintiffs, and are now ready to be delivered by the defendants to the plaintiffs, then the plaintiffs cannot recover in this action.[87]

(b) If the jury believe, from the evidence, that prior to the bringing of this suit by the plaintiffs against the defendants, there was an honest dispute between the plaintiffs and the defendants as to the amount due from the defendants to the plaintiffs, and whether the same was due, and on or about ———, in order to adjust and settle the controversy and the account, the defendants delivered to the plaintiffs a check for $——— and three notes, said check and notes aggregating the sum of $———, and that said check and notes were delivered to the plaintiffs with the statement and understanding that they were given and should be received in full settlement and payment of said claim of the plaintiffs against the defendants, and that plaintiffs received said check and collected and kept the amount thereof, but refused to accept the notes, and returned the same to the defendants, and that the defendants demanded back the said cash unless the plaintiffs should receive the check and notes in full settlement of the account, and the defendants now have said notes in their possession and have tendered the same to the plaintiffs on the trial of this case, then the court instructs you, as a matter of law, that the plaintiffs cannot recover in this action.[88]

87—Lapp v. Smith, 183 Ill. 179, reversing 83 Ill. App. 203, 55 N. E. 717, 75 Am. St. Rep. 100.

In approving this instruction, the court quotes from the case of McDaniels v. Bank, 29 Ver. 230, "that when a party makes an offer of a certain sum to settle the claim when the sum in controversy is open and unliquidated, and he attaches to his offer the condition that the sum if taken at all must be received in full satisfaction of the claim in dispute, and the party receives the money, he takes it subject to the condition attached to it, and it will operate as an accord and satisfaction. . . . The mere act of receiving the money is an agreement to accept the same upon the conditions under which it was offered."

88—Lapp v. Smith, supra.

The court said in comment that the "check was not tendered as a payment of original claim, but it and the notes were offered together for acceptance, as, in compliance with the proposed new undertaking and agreement then submitted for acceptance, in discharge of the unliquidated debt and disputed claim. The appellees were called upon to accept the proposition as an entirety as made, or reject it in toto, citing Ostrander v. Scott, 161 Ill. 339,

§ 676. **Settlements Out of Court Are Favored—Evidence of a Proposed Settlement is Not to Be Considered as an Admission of Liability.** The court instructs the jury that the law looks with favor upon settlements out of court of matters that involve or lead to lawsuits or legislation, regardless of whether the party to be held is liable or not. And the jury must not take any evidence that has been given in this case in relation to settlement or negotiation for compromise of this case, as any recognition whatever on the part of the defendant of any liability to the plaintiff for her alleged injuries. It would be improper for the jury to consider such negotiations or take settlement or compromise as an admission on the part of the defendant that it was liable for any of the alleged injuries to plaintiff.[89]

§ 677. **Composition Agreement.** (a) The court instructs the jury that if they believe from the evidence, that at or about the time that the plaintiff signed the composition agreement in question, the defendant stated and represented to the plaintiff that (any matter as to his pecuniary condition) for the purpose of inducing the plaintiff to sign the said agreement, and that the said plaintiff believed such statements and representations to be true, and was thereby induced to sign the said agreement; then, if you further believe, from the evidence, that the said statements and representations were not true, and that the defendant, at the time they were made, knew they were not true, then the plaintiff would not be bound by the said agreement, and he would have a right to sue for and recover the full amount of his original claim, less the amount received under the composition agreement.[90]

(b) Where a composition agreement is made, the debtor professes to deal with all the creditors who enter into it, on terms of perfect equality, and if at the same time he has a secret agreement with one of the creditors, which gives him an undue advantage, this is a fraud upon the other creditors, which vitiates the composition agreement, and in such case a creditor, although he may have received the amount named in the composition agreement, may sue for and recover the full amount of his original demand, less the amount received under the composition agreement.[91]

§ 678. **Subscription Paper, Consideration for—Who May Perform.** (a) The court instructs the jury, that where money is promised to be paid upon a subscription paper, and the promise is based upon the fulfillment of certain conditions, or the performance of certain work, or the attainment of certain objects, set forth in the instru-

43 N. E. 1089; 1 Beach on Contracts, §§ 51 and 52; McDaniels v. Bank, supra, 70 Am. Dec. 406; Fuller v. Kemp, 138 N. Y. 238, 33 N. E. 1034, 20 L. R. A. 785."

89—C. C. Ry. Co. v. Schuler, 111 Ill. App. 470.

90—Armstrong v. M. N. Bank, 6 Biss. 520, Elfelt v. Snow, 2 Sawyer 94.

91—Hefter v. Cahn, 73 Ill. 296.

ment subscribed, then the performance of the conditions, or the labor, or the attainment of the object, is sufficient consideration to support the promise to pay.[92]

(b) The court instructs the jury that it is not necessary that the parties named in the instrument should themselves perform the conditions; it is sufficient if, upon the faith of the subscription, the condition has been performed by some one.[93]

§ 679. Liability on Subscription—Limited to the Pro Rata Share of Amount Expended. (a) If you believe, from the evidence, that the defendant attended a public meeting in the town of ———, called for the purpose of adopting measures for (building a church) by private subscription, and that at that meeting the defendant and others publicly announced what they would severally give toward the undertaking and that the defendant then promised that he would give $——— to have the said undertaking accomplished, and that the plaintiff, relying upon said promises so made by the defendant and others, went on and performed labor, or expended time and money, and completed the said ———, then said defendant would be liable in this action; if you find, from the evidence, that he has not paid the amount so promised by him, then you should find for the plaintiff.[94]

(b) The court instructs you, that in this class of cases, if all the money subscribed was necessarily expended in securing the end designed, the several subscribers, if liable at all under the evidence, are liable for the full amount subscribed, less such sums as they have already paid thereon; but if the evidence shows that an amount less than the amount subscribed was necessarily expended, then the recovery should be limited to the pro rata share of the amount necessarily expended, less the sums, if any, already paid.[95]

§ 680. Work Done on the Faith of the Subscription—Liability for. If you believe, from the evidence, that the defendant signed the subscription paper introduced in evidence, and that the plaintiff, on the faith of that subscription, went on and (built the church) and became personally liable for the cost thereof, and that the defendant has not paid his subscription or pro rata share thereof, you should find the issues for the plaintiff.[96]

§ 681. Right to Withdraw Subscription After Work Is Begun—When Work Is Completed. (a) The court instructs the jury that if the defendant, among others, subscribed to the said railroad company for the purpose of inducing it to build its road into the town of Grove, Ind. T., and the representatives of the railroad company ac-

92—McCabe v. O'Connor, 69 Ia. 134.

93—Congregational Society, etc., v. Perry, 6 N. H. 164; Miller v. Ballard, 46 Ill. 377; State, etc., v. Cross, 9 Vt. 289, 31 Am. Dec. 626.

94—Wilson v. McClure, 50 Ill. 366.

95—Miller v. Ballard, 46 Ill. 377.

96—Pryor v. Cain, 25 Ill. 292.

cepted the subscription, and acted on the same, and began work, then the court instructs you that the defendant is bound, and could not, at a subsequent date to the time the plaintiff acted upon said subscription, withdraw his subscription, or release himself from the obligation he had undertaken.[97]

(b) You are instructed that the plaintiff, before it can recover in this case, must prove, first, that the writing sued on by the plaintiff was signed by defendant or his duly authorized agent; second, that the plaintiff accepted the same, or that defendant, after signing the same, allowed the plaintiff to build and complete the road without notifying the plaintiff that he would not abide by the terms of said writing; third, that the road was completed within the time specified and in the manner specified, and the grading of the road should be completed in the manner specified.[98]

§ 682. Substantial Compliance Sufficient—Signing Additional Writing Demanded by Plaintiff. (a) The court instructs you that substantial compliance with the terms of the contract was sufficient to entitle appellee to collect the subscription.[99]

(b) The court instructs the jury that if the jury believe from the evidence that after the writing sued on was signed by the defendant the plaintiff demanded that a new and additional writing be signed by the defendant, and that with the demand to sign an additional writing the plaintiff stated that, if the demand of the plaintiff was not complied with, the plaintiff would not build the road, the de-

97—Doherty v. Arkansas & O. R. Co., — Ind. T. —, 82 S. W. 899 (903).

The court said: "This instruction is a clear statement of the law applicable to the facts, as appellee contended had been shown in the evidence, citing 1 Beach, Cont. 65; Page on Cont. Sec. 290; Philomath College v. Hartless, 25 Am. Rep. 511; Bates County v. Winters, 112 U. S. 327, 5 Sup. Ct. 157, 28 L. Ed. 744; Marie v. Garrison, 83 N. Y. 26; Ft. Worth & R. G. Ry. Co. v. Lindsey, 11 Tex. Civ. App. 244, 32 S. W. 716; Armstrong v. Karshner, 47 Ohio St. 276, 24 N. E. 897; Amherst Academy v. Cowls, 6 Pick. 427, 17 Am. Dec. 387."

98—Doherty v. Arkansas & O. R. Co., supra.

The court said: "The consideration for the promise was the building of the railroad, and it was to be void if not completed by December 31st, 1900. The question of acceptance of the subscription was submitted to the jury as a question of fact, and when accepted and acted upon by appellee, and the road constructed without any notice to appellee that appellant was in any way dissatisfied, is there any justice or equity in permitting appellant to say: 'I will not pay. True the road has been constructed according to the terms of my contract of subscription, and the town of Grove has the road. Whatever benefits we expected to secure by the building of the road, we have obtained. But I will not pay because you did not notify me that you had accepted my subscription, though, by its terms, you were not required to do so.' We are clearly of the opinion that the instruction of the court correctly stated the law. Any benefit accruing to him who makes the promise, or any loss, trouble, or disadvantage undergone by or charge imposed upon him to whom it is made, is a sufficient consideration to sustain a promise, citing Amherst Academy v. Cowls, 6 Pick. 427, 17 Am. Dec. 387; Barnes v. Perine, 12 N. Y. 18."

99—Doherty v. Arkansas & O. R. Co., supra.

fendant had a right to treat the negotiations as at an end, and to withdraw the offer contained in the writing sued on, and, if defendant did on such demand, coupled with such statement, treat the negotiations as ended, and withdrew his promise in such a way as to notify plaintiff, and never afterwards renewed negotiations, the plaintiff cannot recover.[100]

100—Doherty v. Arkansas & O. R. Co., supra.

To the above instruction the following proviso was added: "provided such demand by plaintiff and such withdrawal of promise by defendant were made before plaintiff had acted thereon by arranging for and commencing the construction of its road." The instruction preceding the proviso was held unobjectionable, but the proviso was considered as unnecessary and erroneous. However, the court from a consideration of the whole case considered this error as insufficient to cause a reversal, for the reason that it does not materially affect the substantial rights of appellant.

CHAPTER XXXVIII.

CONTRACTS—BUILDING.

See Erroneous Instructions, same chapter head, Vol. III.

§ 683. Building According to Specifications—Literal Compliance. The court instructs the jury as a matter of law that in suits on building contracts a literal compliance with the plans, specifications and drawings by the contractor is not necessary to a recovery; and if you find from the evidence that the plaintiff in good faith performed the contract on which recovery in this suit is sought, substantially and in all material particulars according to its terms and the plans, specifications and drawings for the work, without willful departure therefrom or omission in essential points, that such performance is sufficient to entitle the plaintiff to maintain its suit.[1]

1—Hart v. Carsley Mfg. Co., 116 Ill. App. 159. In comment the court said: "Complaint is made of the instruction for appellee, because it makes no reference to the fact that appellee did not procure an architect's certificate, and therefore ignores the principal defense of the appellants, and in effect tells the jury that if the appellee in good faith and substantially performed its contract, that was sufficient to justify a recovery. We think there is no error in giving the instruction. While it is true that before the appellee could recover, it was necessary for it to show an excuse for not obtaining the architect's certificate, that was shown, as we have seen, by the evidence which formed the basis of the jury's answers to the special interrogatories. These answers, in our opinion, show that the criticism of appellants' counsel of this and appellee's fifth instruction, also quoted in the statement, is not well founded. It follows that if the architects were guilty of bad faith or fraud, as found by the jury, the jury could not possibly have been misled as to the law of the case, or to appellants' prejudice by either the second or fifth instructions. Moreover, as is well established, the instructions must be read as a series and considered together. Appellants' thirteenth, fourteenth and fifteenth instructions fully cover any question in the case regarding the architect's certificate, and it necessarily follows, as we think, from what is stated in the second instruction, as justifying appellee's recovery, that it would have been entitled to the architect's certificate, and it would have been bad faith on the

§ 684. **Substantial Compliance—Rule as to Recovery—Acceptance.** (a) If you believe, from the evidence, that the plaintiff, by the consent of the defendant or by an agreement with him during the progress of the work, constructed some parts of the building of materials different from that required by the written agreement, or of a size and form different from that mentioned in the written agreement, still if you further believe, from the evidence, that the building as constructed was useful to the defendant, then the plaintiff is entitled to recover the contract price for erecting said building, less the difference in value of these parts so constructed, and their value, if they had been constructed according to the written contract, crediting the defendant, of course, with such amounts as you find, from the evidence, the defendant has paid upon the contract.[2]

(b) Although you should believe, from the evidence, that the plaintiff did not fully and in all particulars build and furnish the house according to the contract, still, if you further believe, from the evidence, that he substantially completed it, leaving but little to be done, and so far performed his contract as to erect a house useful to the defendant, and that defendant has taken possession and is using the same, then the jury should allow to the plaintiff the contract price for building the same, less such amount as it would take to construct these parts omitted or neglected to be built by the plaintiff.[3]

§ 685. **Fulfillment Prevented by Defendant.** If the jury believe, from the evidence, that the plaintiff has furnished the material and completed the building, mentioned in the contract, in a good and workmanlike manner, then, although the jury may further believe that the same was not completed within the time limited in the contract in that behalf, still, if the jury further believe, from the evidence, that the delay complained of was caused by the defendant himself, and without fault on the part of the plaintiff, then the plaintiff is entitled to recover the balance, if any, unpaid upon the contract price, with ——— per cent. interest thereon, from the time the same was payable by the terms of the contract.[4]

§ 686. **Construction of Building—No Time Set—Reasonable Time.** (a) The court instructs the jury as a matter of law that the contract in evidence did not obligate the plaintiff to complete the seven houses separately, or any number less than all, before the rest, but merely required the completion of all seven within a reasonable time.

(b) The court instructs the jury that under the provisions of

part of the architects had they refused a certificate in face of the existence of such facts. The law bearing upon these instructions is stated in the quotation from the Foster case, supra." Foster v. McKeown, 192 Ill. 339, 61 N. E. 514.

2—Goldsmith v. Hand. 26 Ohio St. 101; White v. Oliver, 26 Me. 92.

3—Goldsmith v. Hand, 26 Ohio St. 101.

4—Strawn v. Cogswell, 28 Ill. 457.

the contract between the parties offered in evidence, the defendants had the right to take the contract away from the plaintiff, if the plaintiff failed to supply a sufficiency of properly skilled workmen or materials of proper quality or failed in any respect to prosecute the work with promptness and diligence, or failed in the performance of or omitted or neglected to perform any of the agreements of such contract through and by means of the architect in charge of the work certifying such refusal, neglect or omission or failure of the contractor as sufficient ground therefor, and by service of a three-day written notice in accordance with said certificate; and if you find from the evidence that no such certificate was made by the architect and no such notice was given to the contractor, that the contractor had the right to proceed with said work to its completion, and the failure of the defendants and the architect to make such certificate and give such written notice may be considered by you in determining from the evidence what was a reasonable time in the contemplation of the contract for the performance thereof.[5]

(c) The court instructs the jury that no time is fixed in the contract between the parties within which the work contemplated was to be completed, and that as a matter of law the plaintiff was entitled to a reasonable time to complete the work, and if you find from the evidence that the plaintiff did complete the work in substantial compliance with the plans and specifications within a reasonable time after the execution of the contract, you are instructed that the defendants are not entitled to recoup damages for delay in completing the work. In determining what was a reasonable time you should consider the nature, character and extent of the work, the conditions under which it had to be performed, and every other fact and circumstance disclosed by the evidence which will aid in determining the question.[6]

§ 687. Owner to Keep Up Necessary Preceding Work. The court instructs the jury as a matter of law that it is implied in all building contracts, including the one offered in evidence, that the owner will keep the work which necessarily precedes that covered by the contract so far advanced that such work may be done.[7]

5—Hart v. Carsley Mfg. Co., 116 Ill. App. 159 (164 and 183).

6—Hart v. Carsley Mfg. Co., supra. "It is said that this instruction is erroneous, in that it tells the jury that if the appellee substantially complied with its contract, within a reasonable time after its execution, then the defendants were not entitled to recoup damages for delay in completing the work, because counsel say there was no attempt in the case to recoup damages, and that the only purpose in proving damages was to show that the architects were justified in withholding a final certificate, and acted in good faith. We are of opinion that this criticism is not well founded. The plea of the general issue was sufficient to allow appellants to recoup any damages which they suffered, and we find nothing in the record to indicate that they did not seek on the trial to recoup their damages for delay of appellee in completing the work and for failure to comply with the contract in several material respects."

7—Hart v. Carsley, supra. "It is said that this instruction

§ 688. **Counterclaim for Defective Work.** The court instructs the jury that if they believe from the evidence that the plaintiff was to do and perform said work in good and workmanlike manner, and furnish in the construction of said building good and first-class material, and if you further find from the evidence that said work was not done in a good and workmanlike manner, and that the material furnished was not good and first-class, and that the defendant was damaged by reason thereof, you must find for the defendant in such sum as you may believe he is damaged, not to exceed ——— dollars.[8]

§ 689. **Contractor Refusing to Sign Written Contract After Award.** (a) If the jury find, from the evidence, that at or before the time of the award of the contract by defendant to the plaintiffs, the plaintiffs were informed that it would be required of them to enter into and sign a formal contract for the doing of the work, and that, after the award, the plaintiffs refused to sign and execute the contract claimed to have been furnished to them, or to sign and execute any contract for the work, after request or notice so to do, then the jury are instructed as a conclusion of law from such fact that the refusal of plaintiffs to sign and enter into formal contract might properly be treated by the defendant as a refusal of the work.

(b) If the jury find from the evidence that the signing of a formal contract for the work was contemplated by the parties, at or before the award of the work on plaintiff's bid, to be done, then the failure of the plaintiffs to sign a contract or to tender to sign a contract for the work awarded to them, unless waived by the defendant, is a waiver of all rights under the award so made.

(c) If the jury find from the evidence that defendant requested plaintiffs to enter into and sign a formal contract for the work awarded to them, and that they refused so to do, or to tender to sign or enter into formal contract for the work, and that, after request of defendant to plaintiffs to enter into contract, they refused so to do, or to tender to sign a contract for the work so awarded, and that after such refusal the defendant relet the work to other parties, then the jury will find for defendant.[9]

is erroneous because not based upon any evidence in the record, and it ignores a provision in the contract that provides that if the contractor is delayed by the act or default of the owner, no allowance shall be made therefor unless a claim in writing is presented to the architect within twenty-four (24) hours after the occurrence of the cause or commencement of such delay. We think there is ample evidence in the record to justify the instruction, and the fact that it does not mention the clause of the contract referred to is immaterial, since the jury made no allowance whatever to the appellee because of any delay, and none was claimed. Moreover, it is clear from the evidence that the parties, by their acts, waived the time of the performance of the contract."

8—Clapper v. Mendell, 96 Mo. App. 40, 69 S. W. 669 (671).

9—In Hancock v. Stout, 28 Neb. 301, 44 N. W. 446 (447), an action by an accepted bidder for damages on account of defendant's alleged

§ 690. View of the Premises by the Jury. You are to go to the cathedral, and see the work done by the plaintiff, and the place where it was done, to enable you the better to understand the testimony given before you in the case, and to determine what weight shall be given to the testimony; and you are to determine, from the testimony in the whole case, and the view you make, whether the work was done in a good and workmanlike manner.[10]

§ 691. Building Contract—When Recovery May Be Had Under the Common Counts. (a) The court charges the jury that if the evidence reasonably satisfies them that there was an express contract between plaintiff and defendant for the construction of the house, then he is not entitled to recover under the common counts for money due on account, and for merchandise, goods and chattels sold, and for work and labor done, or upon any of them, except what may be due, if anything, for the extra work done and extra material furnished by him, unless the evidence also reasonably satisfies the jury that he complied with the terms of the contract, or that defendant accepted the house as constructed. The burden of proving one of these two facts rests upon the plaintiff, and unless he has done so to the reasonable satisfaction of the jury, they must find for the defendant, except as to plaintiff's claim for extra work done and extra material furnished.

(b) The court charges the jury that, except as to his claim for extra work done and extra material furnished, plaintiff is not entitled to recover upon any one of the common counts for money due on account, and for merchandise, goods and chattels sold, and for work and labor done, unless the evidence reasonably satisfies their minds, either that he complied with the undertakings of the contract on his

refusal to employ him, the court said that the above instructions should have been given in substance.

10—Fitzgerald et al. v. La Porte, 67 Ark. 263, 54 S. W. 342 (343).

The court said: "We are of the opinion that the view of the premises by the jury is a species of evidence, and must necessarily operate to some extent upon the minds of the jury. The verdict must be supported by other evidence than the view, and a verdict depending upon a view alone could not be upheld, but we do not think the court erred in refusing to tell the jury that they must not base their verdict in any degree upon such an examination. If the jury were not allowed to base their verdict in any degree upon the facts ascertained by the view, there would be little advantage in allowing a view to be made. If that was the rule, a view would be almost certain to prejudice one side or the other; for the jury, after having seen the work itself, could hardly eradicate the impression thereby made upon their minds, so as to render their verdict without reference thereto. The statute permits the view by the jury, to enable them better to understand the testimony, and for the reason that it may tend to enlighten their minds with reference to the issues of facts involved in the case. We think it was evidence to be considered by the jury in connection with other facts in the case. Benton v. State, 30 Ark. 349; Tully v. Railroad Co., 134 Mass. 503; Smith v. Morse, 148 Mass. 407, 19 N. E. 393; People v. Thorne, 156 N. Y. 286, 42 L. R. A. 368, note, 50 N. E. 947. On this, as well as on other points discussed, we think the charge of the presiding judge was correct."

part, or that defendant accepted the house as contracted. The burden of proving one of these facts to the reasonable satisfaction of the jury is upon plaintiff. If the evidence does not so satisfy their minds that he complied with his part of the contract, but they find that defendant nevertheless accepted the house as constructed, then he is entitled to recover for work done and for the material furnished in the construction of the house, outside such extra work and extra material, only their actual value, less payments thereon made him, and interest on such excess from the time the same became due.[11]

11—Aarnes v. Windham, 137 Ala. 513, 34 So. 816, holds that the trial judge erred in refusing to give the above instruction. The court said: "If it be said that the charges are misleading in the use of the word 'acceptance,' since the defendant might have had the use and benefit of the house without acceptance, it must be noted that in each charge, that word is accompanied with the words 'as constructed,' thereby limiting the acceptance of the house to its condition as constructed."

CHAPTER XXXIX.

CONTRACTS OF MARRIAGE, BREACH OF—MARRIAGE—PROOF OF.

See Erroneous Instructions, same chapter head, Vol. III.

§ 692. **Breach of Promise—How Proved.** The jury are instructed, that under a declaration alleging a promise to marry upon request, direct and positive proof of request and refusal are not required; these may be inferred from circumstances, if the jury believe, from the evidence, that the circumstances proved are such as show that what passed between the parties was equivalent to a request and refusal.[1]

§ 693. **Mere Attentions Not Sufficient—Burden of Proof.** (a) The burden of proof is on the plaintiff, and she must prove her case, as charged in her petition, by a preponderance of the evidence; and, if the jury find from the evidence that she has failed to do so, they must find the issues for the defendant.

(b) Unless the jury can first find from the evidence that the defendant actually promised to marry the plaintiff, and that she, in earnest, accepted said promise, and that the plaintiff actually and in earnest promised to marry the defendant, and he received her promise in earnest, and unless the jury first find that such mutual promises were so given and received, then the jury must find the issues for the defendant; and in such case it makes no difference

1—Southard v. Roxford, 6 Cowen (N. Y.) 254.

whether or not plaintiff and defendant had sexual intercourse with each other.

(c) If the jury find from the evidence that the attentions, if any, which defendant showed plaintiff, were merely such attentions as might be expected in a case of illicit intercourse between a man and a woman, where one or both wished prolongation of the same, and were seeking opportunities for sexual gratification, and were not prompted by those feelings of affection which usually follow a marriage engagement, then they must find the issues for the defendant.

(d) The mere fact that an unmarried man is gallant to women, and shows to unmarried women courtesies and attentions, is, taken alone, no sufficient proof that he has marriage in his purpose, nor that he is engaged to be married. If, therefore, the jury find from the evidence that defendant was gallant in his conduct to plaintiff, and showed her courtesies and attentions, whether from a spirit of gallantry, or from the motive indicated in instruction No. 3 in defendant's series of instructions, but not for the purpose of marriage, nor from the feelings of marriage engagement, then they must find the issues for the defendant.[2]

§ 694. **No Time Set for Marriage; to Be Performed Within Reasonable Time.** (a) You are instructed that under a declaration charging a promise to marry upon request, or within a reasonable time, such request need not necessarily be made by the plaintiff herself, and in this case if you find, from the evidence, that there was a valid subsisting contract of marriage between the plaintiff and defendant, and that no definite time was fixed by the parties in the contract, then the law would presume a contract to marry within a reasonable time, and if you further believe, from the evidence, that after a reasonable time from the making of said contract, and before the commencement of this suit, the plaintiff herself or anyone authorized by her for that purpose, called upon the defendant and requested him to marry the plaintiff, and that he refused and neglected to do so, then you should find the issues for the plaintiff.[3]

2—The above instructions were approved in Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024 (1026-7).

3—Judy v. Sterrett, 153 Ill. 94 (100), aff'g 52 Ill. App. 265 (277), 38 N. E. 633.

"The purpose of the instruction was manifestly to inform the jury that, in a contract of marriage, where no definite time was fixed by the parties thereto for its performance, the law will presume that the contract was to be performed within a reasonable time, and that in a contract to marry upon request or within a reasonable time, the request need not necessarily be made by the plaintiff herself but might be made through an authorized agent. It is not necessary that an instruction intended to subserve some particular office or to define the law on some particular branch of the case should have embodied in it every fact or element essential to sustain the action. Village of Sheridan v. Hibbard, 119 Ill. 307, 9 N. E. 901; C. B. & Q. R. Co. v. Payne, adm., 59 Ill. 534. It is sufficient if the jury were informed in other in-

(b) If the jury find from the evidence that on or about the —— day of ———, plaintiff was single and unmarried, and that at such time defendant proposed marriage to plaintiff, and that plaintiff accepted such proposal, no definite time having been fixed for such marriage; that thereafter defendant failed and refused to marry plaintiff, abandoned her, and declared that he did not intend to marry her, then you shall find for the plaintiff.[4]

§ 695. **Unchastity No Defense, When.** The court instructs the jury, that when a party enters into an engagement to marry with a knowledge that the other party is unchaste, he will be deemed to have waived the objection, and cannot afterwards set it up as a reason for his refusal to comply with his promise; but if either party shall be guilty of acts of unchastity subsequent to the engagement, the other party is absolved from the contract, whether such subsequent acts be known to the latter or not.[5]

§ 696. **Subsequent Illicit Relations Between the Parties, No Excuse.** If you find that such proposal of marriage was made by defendant and accepted by plaintiff, then any illicit relations that may thereafter have occurred between plaintiff and defendant, induced by such promise, cannot justify defendant in refusing to consummate such marriage.[6]

§ 697. **Incapacity to Contract Other Marriage—Woman's Knowledge of Man's Prior Marriage—Common Law Marriage.** (a) The court instructs you that a mistake or ignorance of the law happens when a person, having full knowledge of the facts, comes to an erroneous conclusion as to their legal effect; and if you believe from the evidence in this case that the plaintiff was in full possession of all the facts which have been brought out in evidence with reference to the relations existing between the defendant and his reputed wife, and that such erroneous conclusion, as to the legal effect of such relations, was brought about by the fraud or imposition or misrepresentations of the defendant, and if you further find and believe that the defendant knew the legal effect of the relations which existed between him and his reputed wife, which would incapacitate him from making a lawful marriage contract with the plaintiff, and that he took advantage of her ignorance of such legal effect of the facts which were known to her, induced her to believe that he could legally marry her, and that she honestly and in good faith believed in the false and fraudulent statements thus made to her, and that she was ignorant of the legal effect of the facts which were known to her, in that event you should find for the plaintiff.[7]

structions what was required to constitute 'a valid, subsisting contract of marriage.'"

4—Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024 (1026).

5—Sprague v. Craig, 51 Ill. 288; Denslow v. Van Horn, 16 Ia. 476; 2 Pars. on Cont. 66.

6—Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024 (1026).

7—Davis v. Pryor, 3 Ind. Ter. 396, 58 S. W. 660 (664).

(b) The relations, however, which existed between the defendant and his reputed wife, and which incapacitated him from making a valid and binding contract of marriage on his part, do not necessarily relieve him from the consequences of any marriage contract that he may have made with the plaintiff in this case, if you believe from all the evidence that she, when such alleged promise was made, was honestly and in good faith of the opinion and belief that the defendant was free to contract a lawful matrimonial alliance, and that such belief was induced by the misrepresentations of the defendant.[8]

§ 698. Promise to Marry in Consideration of Sexual Intercourse Illegal. The court instructs the jury that when a man promises to marry a woman solely on consideration that she should permit him to have sexual intercourse with her, or solely on the consideration that she would permit him to have sexual intercourse with her, and as a result of such intercourse she should become pregnant, is illegal and cannot be enforced in law. And in this case if you find, from the evidence, that the defendant did promise to marry the plaintiff, as alleged in the third count of the declaration, and that there was no other consideration for such promise except that alleged in said third count of said declaration, then you should find for the defendant.[9]

§ 699. Breach of Promise of Marriage, Series of Instructions on—Seduction—Good Faith—Burden on Defendant to Show Justifiable Cause for Non-Performance—*Plaintiff's Instructions.* (a) If the jury shall believe from the evidence that in the month of ——— the plaintiff and defendant, then being single and unmarried persons, entered into a contract or engagement to marry each other, and that within twelve months thereafter the plaintiff requested the defendant to marry her, and the defendant, without justifiable cause, failed and refused to do so, then the court instructs the jury that their verdict must be for plaintiff.

(b) If the jury believe from the evidence that after the institution of this suit the defendant offered to marry the plaintiff, but that he made such offer in bad faith, merely to avoid liability in this action, and with the intent or purpose immediately to abandon and desert plaintiff, and such bad faith, intent, or purpose was known to the plaintiff, then the plaintiff was under no obligation to

8—Davis v. Pryor, supra.
The court said: "The law unquestionably is settled that a married person can enter into a contract of marriage, and thereby become responsible in damages to the other contracting party, provided the party with whom the married person contracts is ignorant of the fact that the person is married; otherwise, there is no consideration to support the contract. Kelley v. Riley, 106 Mass. 339; Pollock v. Sullivan, 53 Vt. 507, 38 Am. Rep. 702. And, while the foregoing instruction is inaptly stated, we think it is not objectionable."

9—Judy v. Sterratt, 153 Ill. 94 (101), 38 N. E. 633.

accept such offer, and the same constitutes no defense whatever to this action.

(c) The jury are instructed that if they find and believe from the evidence that a mutual promise of marriage was entered into between the plaintiff and defendant about the month of ———, and that prior to the institution of this suit the defendant failed and refused to carry out such promise and engagement, then the burden is upon the defendant to establish to the satisfaction of the jury, by the weight or preponderance of credible testimony, that he did have a justifiable cause for such refusal to carry out his promise.

(d) In determining the question of the good or bad faith of the defendant in offering to marry the plaintiff after the institution of this suit, the jury may take into consideration the prior declarations, if any, of the defendant touching his purpose to marry and then desert her, as well as the prior act and conduct of the defendant in converting his property and estate, if he did so convert his property, together with all the other facts and circumstances in evidence in the case.

(e) If the jury shall believe from the evidence that a mutual promise and engagement was entered into between the plaintiff and defendant about the month of ———, to marry each other, and that under said pre-existing promise of marriage defendant induced and procured the plaintiff to submit to sexual intercourse with him, whereby she became pregnant, and bore a child on the —— day of ———, then, in determining the amount of damages to which they may believe the plaintiff is entitled, they may take those facts into consideration, together with the pain and anguish of body and mind she may be shown by the evidence to have suffered, together with all the other facts and circumstances in the case; and the jury may assess her damages at any sum they may deem proper, not to exceed the amount sued for, namely, $———.

Defendant's Instructions. (f) The jury are instructed that if they find from the evidence that the plaintiff was a lewd and unchaste woman prior to the alleged breach of the alleged contract to marry, and the defendant was ignorant of the same, and believed her to be a chaste and virtuous woman, their verdict must be for the defendant.

(g) Although the jury may believe from the evidence that defendant had promised to marry the plaintiff, and that different dates had been fixed for the marriage, before the bringing of the suit, yet if they further find that, after the bringing of the suit, plaintiff agreed with the defendant that they would be married on a certain day, and that defendant, in pursuance of such agreement, procured his license to marry the plaintiff, and went, with a justice of the peace and witnesses, to the house of the plaintiff's father, where she was staying, for the purpose of carrying out his promise, and then and there offered to marry the plaintiff, and that plaintiff

refused to marry the defendant, their verdict must be for the defendant, unless such offer was made as set out in instruction No. 2, given on behalf of plaintiff.

(h) If the jury believe from the evidence that any witness in the cause has sworn wilfully false to any matter material to the issues in the cause, they may disregard and reject the entire testimony of such witness.

(i) If the jury find from the evidence that defendant promised to marry the plaintiff on condition that she would permit him to have criminal intercourse with her, and she did permit such intercourse, such promise is against public policy and void, and the jury should find their verdict for the defendant.

(j) That defendant had disposed of his property constitutes no legal reason or excuse for plaintiff's refusal to marry the defendant; and if the jury find from the evidence that defendant on the 29th day of March, ———, proposed to marry the plaintiff on the next day, and that plaintiff accepted his offer, and agreed to marry defendant on the next day; and further find that on the next day defendant, with a license to marry plaintiff, and an officer authorized to solemnize said marriage, went to the house of plaintiff, and then and there offered himself in marriage to plaintiff, and that she refused to marry him,—they will find their verdict for the defendant, unless such offer was made as set out in instruction No. 2 given on behalf of plaintiff.[10]

10—Harmon v. Donohoe, 153 Mo. 263, 54 S. W. 453.

"Instructions (a) and (c) were doubtless taken from the instructions in Bird v. Thompson, 96 Mo. loc. cit. 426, 9 S. W. 788, for the same terms, 'justifiable cause,' were used in that case; and this court pointed out in that case that 'while the instructions when taken singly, may be subject to verbal criticism, when taken as a whole no intelligent juror could have been misled by them.' That is, the other instructions given explained what a justifiable or reasonable cause for refusing to marry the plaintiff was, and those other instructions, read with the instruction criticised, put the whole matter before the jury. We reached the same result in Liese v. Meyer, 143 Mo. loc. cit. 560, 45 S. W. 282. Instruction No. 1 and 3 for plaintiff, when read in connection with instructions (f) and (i) given for defendant, show what cause would justify the defendant in refusing to marry the plaintiff, to wit, her previous unchastity, or that he promised to marry her on condition that she would permit him to have criminal intercourse with her. This was the gist and sum of the case as presented by the evidence, and these were the only justifiable causes bona fide asserted by the defendants. The jury could not, therefore, have misunderstood or been misled by these instructions as to what was meant by justifiable cause. Moreover, if the defendant was dissatisfied with the general character of the definition of 'justifiable cause,' it was his privilege and duty to ask a proper instruction. Browning v. Railway Co., 124 Mo. loc. cit. 71, 27 S. W. 644. However, as pointed out, he did ask, and the court gave, explanatory instructions, and the defendant has nothing to complain of in this respect. Instructions No. 5 (e) given for the plaintiff is subject to verbal criticism, but it is in fuller form than the instruction on the measure of damages which was approved in Browning v. Railway Co., 124 Mo. loc. cit. 71, 27 S. W. 644, because the defendant did not ask a more specific instruction. Instruction 5 lays the predicate for the recovery of any damages, specifies what the jury may con-

§ 700. Marriage Contracts, How Proved. The court instructs the jury, that to prove a contract of marriage an expressed contract need not be shown. A mutual engagement may be inferred from constant and devoted attention, gladly welcomed, from reciprocal affection, and the interchange of letters expressive of earnest love.[11]

The court instructs you, that the contract to marry may be proved by either positive or circumstantial evidence, and when it is proved, by one or the other mode; unless the evidence discloses facts absolving the party from its observance, the party must be held liable for its breach precisely as in the case of any other contract.[12]

§ 701. Proof of Marriage Presumption of Its Continuance. The marriage may be proved in different ways. Evidence of eye-witnesses who saw the marriage performed is sufficient (that is, is sufficient if you believe the evidence to be true); and if you are satisfied from the evidence in this case that at the time this act is alleged to have been committed the defendant, J. E., was married to A. E., that would be sufficient evidence upon that part of the case. I will further say that if you are satisfied that the marriage was performed, that the defendant and A. E. were married at some time prior to the time this offense is alleged to have been committed, it would not be necessary for the state to go on and show that they continued to be husband and wife, but it would be presumed they have continued to be husband and wife, in the absence of any evidence to the contrary.[13]

§ 702. Marriage Cohabitation, Presumptive Evidence of. The court charges you that cohabitation and living together as, and recognizing each other as husband and wife, speaking of each other as husband and wife, is only presumptive evidence of actual marriage, and that such presumption is rebutted by the fact, if it is a fact of subsequent permanent separation without any apparent cause after

sider in determining the amount of damages, and then tells the jurors they may assess 'any sum they may deem proper, not to exceed the amount sued for, namely, $10,000.' If the instruction had been simply that the jury might give the plaintiff any sum they deemed proper, not to exceed the amount sued for, it would have been subject to the objection of uncertainty, urged; but, read in connection with what precedes the words objected to in the same instruction, defining specifically what the elements of plaintiff's damages must be, 'no intelligent juror could have been misled' by the plaintiff's instruction."

11—Rockafellow v. Newcomb, 57 Ill. 186; Royal v. Smith, 40 Ia. 615; 2 Pars. on Cont. 62.

12—Wrightman v. Coats, 15 Mass. 1.

13—State v. Eggleston, 45 Oregon 346, 77 Pac. 738.

The court said in comment that the "solemnization of a marriage is based upon the mutual assent of the parties that the relation entered into shall continue until it is severed by the death of one of them. The marriage, however, is sometimes dissolved by a decree of divorce, but this method of separation is happily the exception rather than the rule, in view of which we think the instruction complained of was proper. Hemingway v. State, 68 Miss. 371, 417, 8 So. 317."

the marriage, if there was a marriage of John F. with Julia E shortly after the separation.[14]

§ 703. **Marriage Record as Evidence of Facts Recited.** The marriage record is only a circumstance to be considered by the jury, and is not conclusive proof of the facts recited.[15]

§ 704. **Common-Law Marriage Defined.** A common-law marriage is valid in the state of Texas, and the issuance of a license is not necessary to constitute a valid common-law marriage. A common-law marriage exists when the man and woman enter into an agreement to become husband and wife, and in pursuance of such agreement do live together and cohabit as husband and wife, and hold each other out to the public as husband and wife. Said agreement to become husband and wife may be express or implied. An express agreement is where the parties thereto expressly agree; and implied agreement is one where the conduct of the parties with reference to the subject matter is such as to induce the belief that they intended to do that which their acts indicate they have done. If you believe from the evidence that the plaintiff and defendant agreed to become husband and wife, as claimed by the plaintiff, and that in pursuance of said agreement they lived together and cohabited as husband and wife, you will find for the plaintiff on this issue.[16]

14—Moore v. Heineke, 119 Ala. 627, 24 So. 374 (377).

15—Woods et al. v. Moten et al., 129 Ala. 228, 30 So. 324.

"This charge given for the plaintiff placed this marriage record in the class of evidence to which the statute assigns it—presumptive and not conclusive proof of what is required to be recorded. Civ. Code 1896, par. 2846, 2847."

16—Cuneo v. De Cuneo, 24 Tex. Civ. App. 436, 59 S. W. 284 (285).

"That a marriage according to common law is valid without regard to observance of statutory regulations, is now settled law in this state. Ingersol v. McWillie, 9 Tex. Civ. App. 543, 30 S. W. 58; Coleman v. Vollmer, — Tex. Civ. App. —, 31 S. W. 413; Chapman v. Chapman, 11, Tex. Civ. App. 392, 32 S. W. 564; Chapman v. Chapman, 16 Tex. Civ. App. 382, 41 S. W. 534; Simmons v. Simmons, (Tex. Civ. App.), 39 S. W. 639; Cumby v. Henderson, 6 Tex. Civ. App. 519, 25 S. W. 673; Railway Co. v. Cody, — Tex. Civ. App, —, 50 S. W. 136. The present consent and agreement between the parties is the gist of a common-law marriage. It requires only the agreement of the man and woman to become then and thenceforth husband and wife. When this takes place the marriage is complete. Simmons v. Simmons, supra. It is not sufficient to agree upon a present cohabitation and a future marriage. 1 Bish. Mar. & Div. § 262; Cartwright v. McGown, 121 Ill. 388, 12 N. E. 737. It is required that the cohabitation be as man and wife and in pursuance of the marriage contract. It can of itself be no part of the marriage contract except it takes place after, and not before, the agreement. Soper v. Halsey, 85 Hun 464, 33 N. Y. Supp. 105; Farley v. Farley, supra. A consent de praesenti is essential to such a marriage, and a subsequent marriage is established by a proof of a promise and a copula, on the ground that the copula was a consequence and performance of an anterior promise. The coupla does not constitute marriage, but it is taken when circumstances justify it, as evidence of the performance of a previous promise. Rodg. Dom. Rel. § 87; Simmons v. Simmons, supra. Cohabitation between a man and woman as man and wife is usually regarded in law as evidence of marriage, and entitled to more or less weight, according to circumstances. The cohabitation necessary to follow a contract of

§ 705. **Common Law Marriage; Proof Required.** Whatever be the form of the ceremony, if the parties agree to take each other for husband and wife, and from that time live confessedly in that relation, proof beyond a reasonable doubt of these facts would be sufficient proof of a marriage, binding on the parties.[17]

marriage per verba de futuro, must be an actual dwelling together by the parties as husband and wife, and a mutual recognition of each other as such in pursuance of the marriage contract. A mere illicit intercourse, though extending over a long period, can never have the effect of validating or consummating a marriage dependent upon cohabitation to complete it. Rodg. Dom. Rel. § 96, and authorities cited."

"Living and cohabiting as husband and wife, or declarations of the parties that they are husband and wife, do not of themselves constitute a marriage in fact. Such acts and declarations are not a substitute for the marriage contract, but are only evidence that may be sufficient to prove a lawful marriage. And when the evidence shows that at the time of the commencement of the cohabitation and conduct which it is sought to prove a marriage, in fact there was in fact no marriage, their mere continuance of such cohabitation and conduct without something more to indicate that there had been a change in the relations of the parties to each other, would not be sufficient to show a marriage in fact subsequent to the commencement of such cohabitation and conduct. But the presumption against marriage when the connection between the parties is shown to have been illicit in origin may be overcome by proof showing that the original connection has changed its character; and a subsequent marriage may be proved by circumstances. The circumstances, however, must be such as to exclude the inference or presumption that the former relation continued, and show that it had been changed into actual matrimony by mutual consent. Williams v. Williams, 46 Wis. 464, 1 N. W. 98, 32 Am. Rep. 722; 2 Greenl. Ev. § 464; Jackson v. Claw, 18 Johns. 346."

17—Hearne v. State, — Tex. Cr. App. —, 97 S. W. 1050.

"There is no error in this charge. While we hardly deem it necessary under the facts of this case for the court to have given the charge, still it could not have injured appellant. The first marriage was proved by a marriage certificate, and, in addition, that appellant lived with his first wife and held her out as his wife. So, if there had been no marriage license, still appellant had contracted a common-law marriage. Waldrop v. State, 41 Tex. Crim. App. 194, 53 S. W. 130; Simon v. State, 31 Tex. Cr. App. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802; Ingersol v. McWillie, 9 Tex. Civ. App. 543, 30 S. W. 56."

CHAPTER XL.

CONTRACTS—OF SERVICE.

See Erroneous Instructions, same chapter head, Vol. III.

§ 706. Neglect to Reduce Contract to Writing—Entering Upon Performance. The court instructs the jury, that when a contract for work and labor is entered into, and the terms agreed upon by the parties, with the understanding that it shall be reduced to writing, and one of the parties to the agreement enters upon the performance of it,

without objection from the other party, the contract in all its terms will be as binding as if it had been reduced to writing.[1]

§ 707. Written Contract Changed by Subsequent Verbal Contract. A contract under seal may be changed by a subsequent verbal agreement to pay an additional sum for the same work and materials mentioned in the agreement. And in this case, if the jury believe, from the evidence, that there was a subsequent verbal agreement between the parties, varying the terms of the written agreement, and that the work in question was done in compliance with the latter agreement, it will be binding between the parties.[2]

§ 708. Legal Effect of Writings. The two paper writings introduced in evidence by the plaintiff are to be construed together, and as a contract to employ plaintiff for the months named at the stipulated wages on the part of the defendant, and is a contract for the plaintiff to serve the defendant for the months named at the stipulated wages.[3]

§ 709. Mere Fact of Services Rendered Creates no Obligation to Pay. (a) The jury are instructed, as a matter of law, that the mere fact that the plaintiff was instrumental in securing the location of a factory on the land of the defendant, does not make the defendant liable to the plaintiff for a commission, and does not entitle the plaintiff to recover in this suit.[4]

(b) If you believe, from the evidence, that the plaintiff made his home at defendant's house during the time for which he claims pay for his services, and that he did not, at that time, intend to charge the defendant for the services he rendered, and both parties regarded the same as a donation, or as an equivalent for living at defendant's house, then he cannot recover for such services in this suit.[5]

(c) Labor done, and services rendered by one person for another, without the knowledge or request of the person for whom the work is done or service rendered, no matter how meritorious or beneficial to the latter, afford no ground of action in favor of the person doing the work, or rendering the service.[6]

(d) And in this case, though you may believe, from the evidence, that the plaintiff rendered services which were of value and beneficial to the defendant in saving his crops, still, if you further

1—Miller v. McMannis, 57 Ill. 126.

2—Cook v. Murphy, 70 Ill. 96; Seaman v. O'Harra, 29 Mich. 66.

3—McLendon v. Am. Freehold Land Mortgage Co., 119 Ala. 518, 24 So. 721 (723).

4—In Chicago H. L. Asso'n v. Butler, 55 Ill. App. 461 (462), the court said "that the above instruction is law cannot be disputed. Tascott v. Grace, 12 Ill. App., 639. And there was evidence that the appellee was never employed or requested to take any part in the transactions. It is the right of a party to have an instruction upon his theory of the case if there be any evidence to support that theory. Wooters v. King, 54 Ill. 343; Peoria Ins. Co. v. Anapow, 45 Ill. 86; Kendall v. Brown, 74 Ill. 232; Parmly v. Head, 33 Ill. App. 134

5—Broughton v. Smart, 59 Ill. 440; Morris v. Barnes, 35 Mo. 412.

6—Bartholomew v. Jackson, 20 John. 28.

believe, from the evidence, that such services were rendered without the knowledge or request of the defendant, and that he has never agreed to pay for the same, then the plaintiff cannot recover for such services.[7]

§ 710. Implied Promise to Pay for Services Knowingly Accepted. (a) I charge you that where, in the absence of an express contract, valuable services are rendered by one person to another, which are knowingly accepted, the law will presume an obligation to pay therefor what they are reasonably worth.[8]

(b) While one person cannot make another his debtor without the consent of the latter, or recover for services rendered for another, without a request expressed or implied, yet, if one stands by and sees another doing work for him, beneficial in its nature, and overlooks it as it progresses, and does not interfere to prevent or forbid it, but appropriates such labor to his own use, then, in the absence of a special contract, a request will be implied, and the person for whom the work has been done will be liable to pay for the work what the same was reasonably worth, unless it expressly appears, from the evidence, that it was done as a gift or gratuity.[9]

(c) The court instructs you, that when one person labors for another with his knowledge and consent, and the latter voluntarily takes the benefit of such labor, then the law will presume that the laborer is to be paid for his labor, unless the contrary is shown by the evidence, and if no special contract is proved, fixing the price, then the laborer is entitled to have what his services are reasonably worth.[10]

(d) When work and labor are done and performed for the benefit of another, with his knowledge and consent, and he receives the benefit arising therefrom, then the law will presume a promise on his part to pay for the same; unless it appears, from all the evidence in the case, that such work and labor were done under a special contract, or as a gratuity or a gift.[11]

(e) I charge you, that it makes no difference whether the defendant received any benefit from the first well or not, if defendant consented expressly or implicitly that plaintiff should bore the second well.

(f) I charge you, if you believe that the defendant, after being advised by the plaintiff that it would be best to begin boring in a new place, sent for a man to locate said new place, that the man sent for did locate a new place at the defendant's instance and request, and that the plaintiff acting upon defendant's conduct

7—Coe v. Wager, 42 Mich. 49, 3 N. W. 248.

8—Mansfield v. Morgan, 140 Ala. 567, 37 So. 393 (394).

9—1 Pars. on Cont. 445; De Wolf v. City of Chicago, 26 Ill. 446, 79 Am. Dec. 385; Allen v. Richmond, 41 Mo. 302; 1 Page on Cont. sec. 285.

10—Trustees of Farmington, v. Allen, 14 Mass. 172.

11—O'Connor v. Beckwith, 41 Mich. 657, 3 N. W. 166.

bored or drilled a second well at said new place with defendant's knowledge and consent, even though said consent be implied from defendant's conduct, you will find for the plaintiff.[12]

§ 711. Extra Services Rendered Without Request. (a) The jury are instructed if you believe, from the evidence, that payment was made to the plaintiff for his services at the end of each month during the term of his employment, and a receipt or voucher taken therefor, and that there was no demand made by him for compensation for extra services performed by him during such month or prior thereto, such payment and the receipt and voucher therefor by the plaintiff is to be considered as a settlement and payment in full of and for all demands by the plaintiff up to and prior to the date of such payment, and if you so believe and find, the plaintiff cannot recover under the allegations claiming payment for extra services.[13]

(b) You are instructed that the claimant in this case having applied to the court in 1900 for an allowance and order on the guardian of Mrs. J. to pay her fifty dollars per month for care, maintenance, support and clothing, and having obtained such order, to continue until the further order of the court, and having received and accepted said allowance according to said order, she cannot recover any sum or amount against the administrator in this case for the work by her performed in fulfillment of the terms and conditions of said order.[14]

§ 712. Implied Promise—When Previous Agreement Fixes Rate. You are instructed, if you believe from the evidence, the defendant agreed to pay plaintiff for labor and services furnished by the plaintiff to the defendant at the rate previously paid to the plaintiff for like services and labor by the American G. Co., then that would constitute a contract fixing the rate which the plaintiff could charge the defendant for such labor and services furnished, and if such contract was made, it can make no difference to the plaintiff's right to recover in this action what rate of wages he paid to his carpenters. He would have the right to recover according to the contract, without regard to the amount the labor cost him.[15]

§ 713. Employment for Certain Period Presumed to Continue at Same Rate. (a) The court instructs the jury that if they should

12—Mansfield v. Morgan, supra.

13—West. M. M. Ins. Co. v. Boughton, 136 Ill. 317 (320), 26 N. E. 591.

"It is clear that the words 'term of his employment' as used in the instruction were intended and must have been understood by the jury to refer to the whole term or period of service during which such monthly settlements were had and such receipts and vouchers given. This is the clear purport of said words, and it is impossible to believe that the jury could have understood them as assuming that the plaintiff at the time he was discharged was serving under an existing contract for a year."

14—Gibson v. Wild, 124 Ia. 152, 99 N. W. 569.

15—Glucose S. R. Co. v. Flinn, 184 Ill. 123 (126), aff'g 85 Ill. App. 131, 56 N. E. 400.

find that a contract for $1,000 per year in payment for services was made, the agreement would be presumed to continue from year to year during the time the plaintiff should continue in the defendant's employ, unless the contract was in some way changed by an agreement of the parties; and the burden of proving such change or modification would be upon the party claiming it.[16]

(b) The court instructs the jury, that where a person enters the employ of another under a special contract, fixing the time of service and the price to be paid therefor and he continues in such employment after the term has ended, without any new contract or agreement, he will be considered as holding under the original contract, so far as the price of his labor is concerned. [17]

§ 714. Rate of Compensation Changes with Change in Work. The rule that where a servant employed at a definite rate of wages for a specific term continues after the expiration of the term in the same service, the parties are presumed to have agreed to the same rate of wages does not apply where the character of the services are, by the concurrence of both parties, entirely changed, so that additional privileges are accorded to the servant and the character of the work and the measure of responsibility are entirely changed.[18]

§ 715. Accepting Work as Full Performance—No Waiver of Unknown Defects. (a) If the jury believe, from the evidence, that the defendant inspected the work in question, accepted the work done and quality, and, with such knowledge, accepted the work done and materials furnished by the plaintiff as in compliance with and a full performance of the contract on plaintiff's part, then the plaintiff is entitled to recover whatever, if anything, the jury shall find, from the evidence, is unpaid upon the contract price.[19]

(b) The court instructs the jury, that when a party accepts work done for him, or material furnished, he does not thereby waive objections to any latent defects that may be in the work or in the materials, and which, at the time of acceptance, are not open to inspection and are not known to him.[20]

§ 716. Negotiations for Settlement—Unaccepted Offer Not Binding. The jury are instructed, that the plaintiff is in no manner bound by any offer that he may have made to accept $—— in settlement of his claim provided the jury believe, from the evidence, that such offer was made solely for the purpose of bringing about an amicable settlement with defendant, or by way of compromise; nor in such case should such offer be regarded as an admission that no more than that sum was due.[21]

16—Ledigh v. Keever, 5 Neb. 227 (unof.), 97 N. W. 801 (802).

17—Grover & Baker S. M. Co. v. Bulkley, 48 Ill. 189; Vail v. N. J., etc., Co., 32 Barb. 564; Ranck v. Albright, 36 Penn. St. 367.

18—Ledigh v. Keever, 5 Neb. 207 (unof.), 97 N. W. 801 (803).

19—Strawn v. Cogswell, 28 Ill. 457.

20—Korf v. Lull, 70 Ill. 420; Garfield v. Huls, 54 Ill. 427.

21—Monell v. Burns, 4 Denio 121.

§ 717. **Failure to Make Agreed Monthly Payments for Services.** If the jury believe, from the evidence, that the services claimed and sued for in this suit, were rendered under a contract to work for a longer time than the plaintiff did work, and that the defendant was to make monthly payments for such services, by the terms of the same contract, and that he failed to make such payments as stipulated, then, upon such failure, the plaintiff had a right to abandon the service and to collect of the defendant what the services rendered would amount to at the stipulated price.[22]

§ 718. **Quantum Meruit Recoverable for Substantial Performance.** (a) The rule of law is, that when a job of work is actually and substantially performed, though not in exact conformity with the contract in immaterial particulars, or with variations assented to by the employer, or when the employer accepts the work as and for a completed performance of the contract, then the workman may recover for his work and labor what the same are reasonably worth.[23]

(b) The law is, that when a party makes a special agreement to do certain work in a particular manner, within a fixed time, and he fails to do it in the manner or within the time agreed, yet, if he acts in good faith, and the other party receives any benefit from the work which is done, the law implies a promise by him to pay such sum therefor as the benefit which he receives is reasonably worth to him.[24]

§ 719. **Entire Contract of Hiring—Recovery of Quantum Meruit After Breach by Employee.** The law is, that when a person agrees to work for another for a fixed and definite period, and he performs labor under such contract which is of benefit or value to the employer, and then leaves before the expiration of the term for which he was hired, without his employer's consent and without reasonable cause, although he cannot enforce payment, according to the contract, he is entitled to recover what his services are reasonably worth, over and above the damages sustained by the employer from the breach of the contract by the laborer, less any payments which may have been made on the contract.[25]

§ 720. **Entirety of Contract—Employee Forced Out May Recover on Quantum Meruit.** (a) The court instructs the jury, that while the law is that a person who engages to labor for another for a specified period, at a given price, has no right to recover for his

22—Folliott v. Hunt, 21 Ill. 654.

23—White v. Hewitt, 1 E. D. Smith 395; Dermott v. Jones, 23 How. 220; Dutro v. Walter, 31 Mo. 516.

24—Snow v. Ware, 13 Met. 42; Veazie v. Bangor, 51 Me. 509; Blood v. Enos, 12 Vt. 625, 36 Am. Dec. 363; Parks v. Steed, 1 Lea (Tenn.) 206.

25—2 Pars. on Cont., 38; Pixler v. Nichols, 8 Ia. 106, 74 Am. Dec. 298; Britton v. Turner, 6 N. H. 481, 26 Am. St. Rep. 713; Fenton v. Clarke, 11 Vt. 560; Ralston v. Kohl, 30 Ohio St. 92, 27 Am. Rep. 422; Eakin v. Harrison, 4 McCord (S. C.) 249.

work, etc., unless he performs his entire contract, or is excused therefrom by the employer, or is, in some manner, justified in quitting before the expiration of the time; yet if he is prevented from performing his contract by the employer, or is discharged without reasonable cause from his employment, or is, from ill-usage by his employer, compelled to abandon the service, he may then recover what his labor, actually performed, will amount to at the contract price.[26]

(b) It is the law that if an employer terminates a contract without any fault on the part of the employee or contractor, that then the employee or contractor may sue upon the contract to recover damages, or he may sue in assumpsit upon the common counts, as they are called—the quantum meruit—to recover what his services were worth. That does not mean what they were worth to the employer. It is their fair value; that is, the market value of such work and labor. The main question is first as to whether the contract was performed up to that time by the plaintiffs. If it was not, then the defendant had the right to stop the work and discharge them, and they could not recover. Then comes the question as to the discharge. The burden of proof is upon the plaintiffs in the case, so that if you find [from the evidence] that the contract was performed up to that time by the plaintiffs, but still that they were not discharged but stopped the contract without being discharged, then they cannot recover in this case at all. If that were the case, then the plaintiffs could recover only upon the ground that their work had been of value to the defendant.[27]

§ 721. Same Subject—Damages for Wrongful Discharge—Diligence in Seeking New Employment. (a) I charge you, gentlemen of the jury, that if you believe, from the evidence, that plaintiff and defendants made a contract whereby plaintiff was to work for defendants for the year 1897 at the price of $—— and that plaintiff entered on the performance of the contract without just excuse or provocation, the defendants discharged plaintiff, and plaintiff [in good faith and with reasonable diligence] tried to get work in the community of H. of a similar kind to that he was employed by defendants to do and failed, then the plaintiff is entitled to recover whatever difference there was between the amount paid to plaintiff, and the $—— agreed to be paid.[28]

(b) If you find that plaintiff was discharged from his said employment consider the second matter already indicated. After plaintiff's discharge, if discharged, did plaintiff use reasonable diligence

26—Angel v. Hanna, 22 Ill. 429, 74 Am. Dec. 161; Mitchell v. Scott, 41 Mich. 108; Webb v. U. M. L. Ins. Co., 5 Mo. App. 51.

27—Mooney et al. v. York Iron Co., 82 Mich. 263, 46 N. W. 376.

The court said: "Where, as in this case, the plaintiffs are prevented from performing the contract, they are entitled to recover, if at all, what their work and labor is worth, whether it was of value to the defendant or not."

28—Hartsell v. Masterson, 132 Ala. 275, 31 So. 616 (617).

to secure employment at said place? The burden is upon plaintiff to show that he did. If, then, upon considering this matter, you find and believe from the evidence that plaintiff did use reasonable diligence to secure employment, and failed, then you may allow him on account of this against defendants $——for each day that he remains at said N. after said discharge and failed to find employment. You will observe that there will remain some time from the time plaintiff left N. to go to S., to the end of said three months, to wit,—1900. Now, as to that time, if you find and believe from the evidence that no employment could then have been had by the use of reasonable diligence at said C. N. by plaintiff up to said ———— 1900, then you may allow him on account of such time the sum of $——per day for each day thereof. The total amount, if anything, allowed by you for plaintiff, shall not exceed the sum of 20 days, at —— dollars per day, with interest on the amount so allowed by you, if anything.

(c) "Reasonable diligence" as used in these instructions, as meant by them, is such diligence as a man of ordinary care and prudence, desiring work, would make, under the circumstances surrounding plaintiff at said place, to get it. In other words, the reasonable diligence that plaintiff should have made at said place to obtain employment is such care or diligence as such a man at such a place, desiring work, would ordinarily and reasonably make to get it. As to what such effort or diligence is in this case, you are to determine from the facts and circumstances surrounding the matter at the time in question.[29]

§ 722. Same Subject—Employee Quitting During Term Without Cause. (a) The court instructs the jury, that where one is hired for a definite time and leaves his employer against his employer's consent, and without his fault, before such time has expired, he can recover nothing for the work he has done; and this rule holds as well where the wages are computed by the month, or week, as where they are computed for a gross sum for the whole time. The contract in such cases is entire, and the performance of the whole service is a condition precedent to the laborer's right of recovery.[30]

(b) The court instructs you, that a contract to work for a given number of months, at a fixed price per month, is an entire contract for the whole number of months agreed upon, and when a person agrees to work for another for a given number of months, and to perform such services as are incident to his employment, at a fixed price per month, if he quits such service before the expiration of the number of months agreed upon, without a good and sufficient cause, and without the consent of his employer, he cannot recover for the work which he has already performed.[31]

29—Gillespie v. Ashford, 125 Ia. 729, 101 N. W. 649.

30—2 Pars. on Cont. 36; 3 Page on Contracts § 1485, Miller v. Goddard, 34 Me. 102, 56 Am. Dec. 638; Reab. v. Moor, 19 Johns. 337; Webster v. Wade, 19 Cal. 291.

31—Hensell v. Errickson, 28 Ill.

§ 723. **Same Subject—Sickness as Cause for Employee's Leaving.** The jury are instructed, that even if they believe, from the evidence that the work sued for in this case was done under a special contract, by which the plaintiff agreed to work for a fixed and specified time, and that plaintiff left defendant's employ before the expiration of that time, still, if the jury further believe, from the evidence, that plaintiff was compelled to so quit work on account of sickness (or on account of sore eyes), then he would be entitled to recover for the time he actually did work at the agreed price, if the jury find, from the evidence, that there was an agreed price between the parties; and if the jury find there was no agreed price, then what such labor was reasonably worth.[32]

§ 724. **Improper Conduct Ground for Discharge—Association with Woman.** (a) The court instructs the jury, that when a person is employed by another he must, in his intercourse with his employer and those having control of his business, and with those doing business with such employer, abstain from all vulgarity and obscenity of language and conduct, if required to do so, and must be respectful and obedient to the reasonable commands of his employer and those having control of his business. And a failure in any of these requirements would be good ground for discharging such person before his term of employment expires.[33]

(b) If the jury believe, from the evidence, that at the time of entering into the contract plaintiff promised, as a condition thereof, he would refrain, during such employment, from publicly associating with ——— V———, but during the employment did openly and publicly associate with her, the verdict should be for the defendant.[34]

§ 725. **Want of Skill or Diligence—Right to Discharge—Counterclaim.** (a) When a person engages to work for another, he impliedly contracts that he has a reasonable amount of skill for the employment, and that he will use it, as well as reasonable care and diligence; and a failure to do so, to the injury of his employer, will prevent him from receiving the full contract price. The employer may recoup or set off against the contract price the damages he may sustain for want of reasonable skill, or the observance of reasonable care and diligence in the performance of the work, if the same are proved by the evidence.[35]

(b) If you believe, from the evidence, that the plaintiff repre-

257; 2 Pars. on Cont. 36; 3 Page on Contracts 1485.

32—Hubbard v. Belden, 27 Vt. 645; Green v. Gilbert, 21 Wis. 395.

33—Hamlin et al. v. Race, 78 Ill. 422; Brink v. Fay, 7 Daly (N. Y.) 562.

34—Gould v. Magnolia Metal Co., 207 Ill. 172 (179), 69 N. E. 896.

Plaintiff was a married man employed as salesman by defendant and the woman referred to was one to whom he owed no legal duty and public association with whom was claimed to lessen his efficiency as a salesman. The court said it knew of no rule of public policy that would prevent the making or enforcement of such a contract.

35—2 Pars. on Cont. 54; Parker v. Platt, 74 Ill. 430.

sented to the defendant that he was experienced and skilled in the business of (making cheese), and that he was employed by the defendants in that business, then there was an implied warranty on his part, that his work should be done in an ordinarily good and workmanlike manner; and if you further believe, from the evidence, that the plaintiff was not skilled or experienced in said business, and did not do his work in an ordinarily good and workmanlike manner, then the defendant had a right to discharge him from such employment.[36]

(c) If you find from the testimony, that the plaintiff did this work in a reasonably careful and skillful manner—in such manner as dentists of ordinary standing or good standing in this community or this vicinity would have done it—and that the price charged is a reasonable price, then you should return a verdict in favor of the plaintiff for the full amount claimed.[37]

§ 726. "Ordinary Skill" Defined. The jury are instructed, that what is meant by ordinary skill, in these instructions, means that degree of skill which men engaged in that particular art or business usually employ; not that which belongs to a few men only of extraordinary endowment and capacities, but such as is generally possessed by men engaged in the same business.[38]

§ 727. Counterclaim for Goods Lost through Defects in Machinery. If the jury believe, from the evidence, that plaintiffs were the owners of a clover machine which they ran about the country for hire, and that the defendant employed them to thresh his clover seed at $2 per bushel, and that they, the plaintiffs, undertook and performed said threshing with said machine, knowing that it was then and there defective and out of repair, either in the huller or otherwise, and that in consequence of said defects a large part of defendant's clover seed was lost, and that thereby defendant was damaged in an amount equal to or greater than the sum so agreed to be paid for said threshing, then the law is for the defendant and the jury should so find.[39]

§ 728. Services by a Member of the Family—No Implied Promise to Pay For. (a) The court instructs the jury, that while it is the general rule of law, that where one renders services for another, which are accepted by the other, the law will imply a promise to pay for such services; yet, if such services are rendered by one who is a member of the family, receiving support therein as such, then no such implication arises; nor can a recovery be had for services so rendered, except upon evidence, showing a promise to pay for the same, or such facts and circumstances as lead the jury to believe, from the evidence, that it was understood by the parties that the services were to be paid for.[40]

36—Parkham v. Daniel, 56 Ala. 604.

37—Harrington v. Priest, 104 Wis. 362, 80 N. W. 442.

38—Waugh v. Shunk, 20 Penn. St. 130.

39—Garfield v. Huls, 54 Ill. 427.

40—Thorp v. Bateman, 37 Mich.

(b) The court instructs the jury, that although a child may be over age, still, as long as the relation of parent and child continues to exist the same as before he became of age, the law raises no implied promise to pay for the services of the child.[41]

(c) If you believe, from the evidence, that when the services in question were performed, the plaintiff lived with his father, the same as his other children did, and apparently the same as he had done before coming of age; then to entitle him to recover, it is incumbent upon the plaintiff to prove, by a preponderance of evidence, an express hiring or promise to pay, or circumstances from which such hiring or promise may reasonably be inferred.[42]

§ 729. Intention or Expectation to Be Paid Must Be Mutual. (a) If you believe, from the evidence, that the plaintiff was living with his father as a member of his father's family when the work in question was done, then it is not enough that the plaintiff intended or expected to be paid for his labor—this intention or expectation must have been mutual. It is not necessary that there should have been any express contract in so many words between the parties, but besides the mere doing of the work under the direction of the father, in order to warrant a verdict for the plaintiff, the jury must believe from the evidence, that when the work was done there was an expectation of receiving pay on the part of the plaintiff and an intention to pay on the part of the father.[43]

(b) If the jury believe from the evidence that the plaintiff and her uncle, N. G., were both members of her father's family, and that the services of the plaintiff for which she here sues were rendered as a member of the family and in contributing towards her part of the work of the family, the fact that N. G. immediately or incidentally became the beneficiary of her said services will not authorize a recovery by the plaintiff in this case; and, before the jury will be authorized to find for the plaintiff, they must believe from the evidence that the plaintiff's said services were rendered to and at the instance or request of said N. G., and with the intention and expectation or agreement on the part of both of them that she should be paid by him therefor.

(c) If the jury believe from the evidence that the plaintiff within the time beginning—did, at the instance or request of N. G., render to him services or labor in the way of looking after and keeping clean and in order his room in the house in which he lived, making up and dressing his bed, mending, washing and darning his clothing, or in cooking for the family of which he was a part, or did, after her father's family and said N. G. ceased to occupy the same house, at

68; Smith v. Johnson, 45 Ia. 308; Sprague v. Waldo, 38 Vt. 139, Davis v. Goodenow, 27 Vt. 715; Hays v. McConnell, 42 Ind. 285.

41—Miller v. Miller, 16 Ill. 296; Hart v. Hess, 41 Mo. 441; Wells v. Perkins, 43 Wis. 160; Adams v. Adams, 23 Ind. 50; Smith v. Smith, 30 N. J. Eq. 564.

42—Steel v. Steel, 12 Penn. St. 64; Hiblish v. Hiblish, 71 Ind. 27.

43—Hiblish v. Hiblish, 71 Ind. 27.

the instance or request of said N. G., cook his meals, carry them to his room in cold weather, wash or mend his clothing, dress and keep in order his room, or perform such general housework for him; and shall further believe from the evidence that said service and work, if any, was rendered by the plaintiff with the intention and expectation on her part and the intention and expectation or agreement on said N. G.'s part that she should be paid therefor,—they should find for the plaintiff the customary and reasonable value of her services and labor so rendered by her, if any, as shown by the evidence, to said N. G., not to exceed $—— per month nor $—— in the aggregate.

(d) Upon the other hand, although the jury may believe from the evidence that labor and services were performed by the plaintiff for said N. G. of the character described in her petition, and at his instance and request, and if they further believe from the evidence that the same were performed without any intention at the time upon her part to charge her uncle therefor, or intention or agreement on his part to pay therefor, the law will presume that such labor or services were performed gratuitously, and in that event the jury should find for defendant.[44]

§ 730. Extent of Relationship Required—Rendering of Services is Prima Facie Evidence of Acceptance. (a) If the jury find that the plaintiff rendered valuable personal services to and for the benefit of the late ———— during her lifetime, at her request, and shall further find that said ————, in consideration of said services, promised to reward the plaintiff for said services, and did not perform said promise, then the jury shall find for the plaintiff against the administrator of said ———— for the value of said services according to the proof in the case, provided the jury shall find that said promise was made to take effect within three years prior to the institution of this suit.

(b) The fact that the plaintiff was a nephew of the deceased husband of ————, if the jury so find, does not make him a member of her family; and if the jury shall find that, not being a member of her family, the plaintiff rendered useful and valuable personal services to and for the benefit of said ———— during her lifetime, the fact of rendering such services furnishes prima facie evidence of their acceptance by the said ————, and, in the absence of proof to the contrary, of any express contract, raises an obligation to pay what they were worth; and, if the jury shall find that such payment has not been made, they shall find for the plaintiff in such a sum, provided they shall find that the defendant is the administrator of said ————.[45]

§ 731. Father Not Bound to Pay a Daughter Though of Age, for Work Done by Her While Living at Home and as a Member of the Family, Except by Agreement—Series. (a) If you should find in

44—Galloway's Adm'r v. Galloway, 24 Ky. 857, 70 S. W. 48.

45—Gill v. Staylor, 93 Md. 453, 49 Atl. 650.

this cause that the plaintiff is the daughter of the defendant, and that she, at or about the time alleged in the complaint, went to live with her father under an agreement and understanding that she should live with her father as a member of his family and for her services she should have her board and lodging and also that of her child, and that she should have in addition what she could make out of the surplus eggs and butter and other truck raised on the farm, and no other compensation; and that plaintiff went on under such an agreement and performed the services alleged in the complaint, receiving the surplus eggs and butter and other truck, or the proceeds thereof, receiving her board and lodging and that of her child, then, and in that case, the plaintiff could not recover.

(b) The plaintiff is the daughter of the defendant, and that fact seems to be undisputed, and if while doing the work, if you find she did the work for which she is claiming pay, she lived and made her home with her father after arrival at the age of majority, and as a member of her father's family, the plaintiff is not entitled to recover anything for such work, unless the evidence in the case shows an agreement or understanding between her and her father that she should have pay therefor. Ordinarily, where one person does work for another, who knowingly permits the work to be done and receives the benefit, the law raises and implies a contract for a fair compensation; but there is no such implied contract between father and daughter while living together as members of one family, and one does work for the other. And if such was the relation between these parties, while the work was being done, the defendant is not liable, unless there was an agreement or understanding between the parties that compensation should be made. It was and is not enough that this plaintiff herself expected or intended to be paid; the understanding must have been mutual. But by this it is not meant that words must have been uttered or passed between the parties expressing the intention, but besides the mere doing of the work by the daughter for the father under her father's direction, if it was so done, there must be a proof tending to show, and enough to satisfy your minds of the fact, that there was an understanding between the parties, an expectation of payment by the daughter, and an intention to pay on the part of the father.

(c) If the father, at the time his daughter after arriving at majority was working for him, knew that his daughter was expecting payment for the work so done, and allowed her to continue to work in the belief, without notice that he did not intend to pay, he would be bound to pay; and in this case it is a question of fact for you, in the light of all the facts and circumstances in proof, to say whether there was any understanding or agreement between the parties.

(d) It is a presumption of law that a father is not bound to pay a daughter, though of age, for work done by her while living at home and as a member of the family; but this presumption may be overcome by proof of an agreement or understanding for compensation,

and such understanding may be inferred from the circumstances shown in evidence, if the jury deem the inference warranted.

(e) If there was an understanding between the parties that the work should be paid for, and no agreement as to the amount, you should allow such sum as under the evidence is shown to have been the ordinary and reasonable compensation for such work.

(f) Where a father and his adult children live together as members of the same family, there is no implied undertaking on the part of either to pay for services; but such an undertaking may always arise not only from an express contract, but it may be inferred from the surrounding circumstances.[46]

§ 732. Stranger Living as a Member of the Family—Recovery for Services. (a) It is the law that where one person lives as one of the family of another, being provided with food, clothing, lodging and care as one of the family, and doing labor and work for such other person, and without any contract relating to it, such person cannot recover for labor performed, nor can the other recover for board, lodging, clothing, etc. In such a case, an action cannot be maintained by either party.

(b) If you find from the evidence that the plaintiff, ————, during the time named in her complaint lived in the family of X, and as one of the family, and was being provided for by him as one of his family, and without any contract for wages or compensation for her services, or any understanding between them to that effect, then she cannot recover for such services and labor.[47]

(c) If the jury believe, from the evidence, that the plaintiff worked for defendant, and that his time and labor were reasonably worth more than his board and washing, then the plaintiff is entitled to recover what his time and services were reasonably worth, over and above what he has received or been paid, if anything, as shown by the evidence; unless the evidence further shows that the plaintiff agreed to do the work for his board and washing, or that there was some other special contract between the parties fixing the price of the labor.[48]

(d) The court instructs the jury that where one is taken into the family of another, and is regarded and treated in every respect as a member of the household, and is a member of such family, even when there may be no ties of blood, there is no implied obligation to pay for services rendered, on the one hand, nor for board, schooling, clothing, care and medical attention on the other.[49]

46—Story v. Story, 1 Ind. App. 284, 27 N. E. 573 (574).

The court cited Hilbish v. Hilbish, 71 Ind. 27; Smith v. Denman, 48 Ind. 65; Webster v. Wadsworth, 44 Ind. 283; Daubenspeck v. Powers, 32 Ind. 43; King v. Kelly, 28 Ind. 89; Cauble v. Ryman, 26 Ind. 207; Adams v. Adams, 23 Ind. 50; Pitts v. Pitts, 21 Ind. 309; House v. House, 6 Ind. 60; Oxford v. McFarland, 3 Ind. 156; Resor v. Johnson, 1 Ind. 100.

47—Knight v. Knight, 6 Ind. App. 268, 33 N. E. 456.

48—Wells v. Perkins, 43 Wis. 160; Sword v. Keith, 31 Mich. 247.

49—Boyd v. Starbuck, 18 Ind. App. 310, 47 N. E. 1079 (1080).

CHAPTER XLI.

DAMAGES—MEASURE OF.

See Erroneous Instructions, same chapter head, Vol. III.

IN GENERAL.

ATTACHMENT—GARNISHMENT.

CONTRACTS AND SALES.

CONTRACTS OF MARRIAGE—BREACH OF.

IN GENERAL.

§ 733. Damages, General and Special Defined. General damages are those which the law presumes to flow from an unlawful act. Special damages are those actually shown to have been sustained. General damages may be recovered without proof of any special amount.

Special damages in order to be recovered must be proved as to amount.[1]

§ 734. Liability to Be Settled First—Damages. (a) The jury are instructed that if, under the instructions of the court, they find from the evidence in this case that the plaintiff is not entitled to recover, then they will not have occasion to at all consider the question of damages.[2]

(b) The jury are instructed that if, under the instructions of the court, they find, from the evidence in this case, that the plaintiff is not entitled to recover, then they will have no occasion to at all consider the question of damages or the character or extent of the injuries of the plaintiff, whether serious or slight.[3]

§ 735. Question of Appeal If Large Judgment is Rendered, Should Not Be Considered by Jury. In arriving at the amount of damages in this case, the jury ought not to consider the question whether the defendant would be more likely to pay a judgment if rendered for a smaller amount than for a larger amount, rather than appeal the case to the Supreme Court, as the question of appeal ought not to be considered by the jury in making up their verdict of damages. And it ought not to be considered at any stage of the case.[4]

§ 736. Damages Limited to Claim in Complaint—Whether Interest Should Be Allowed—Computation Of. (a) You are instructed that you cannot award the plaintiff greater damages than he claims in his complaint, which is $——, and interest on the same at the rate of —— per cent per annum from the —— day of ————.[5]

(b) The court submits to the jury a form of verdict which the jury may use; also a calculation of the amount of interest on the amounts sued for in the first and second counts of the petition, but the court instructs you that it is your duty to calculate the amount of

1—Bibb County v. Ham, 110 Ga. 340, 35 S. E. 656.

2—C. C. Ry Co. v. Osborne, 105 Ill. App. 462 (468).

"It is not a fit preparation for the jury dispassionately to consider the question of liability, to proceed first with the discussion of the probable and serious consequences of the injury, and then with sympathies aroused and unavoidably expressed, to return to a consideration of the question of liability. It is conducive to the best results and its proper caution for the court to advise the jury in the language of the above instruction."

3—C. C. Ry. Co. v. Allan, 169 Ill. 287 (291), 48 N. E. 414.

4—Neely v. Detroit S. Co., 138 Mich. 469, 101 N. W. 664 (668).

5—Bailey v. C. M. & St. P. Ry. Co., 3 S. D. 531, 54 N. W. 596 (597), 19 L. R. A. 653.

"This instruction is objected to upon the ground that it militates against section 4578, Comp. Laws, which provides that, in a case like this, the giving of interest upon the damages found is in the discretion of the jury. But this instruction does not attempt to direct or control the jury in the exercise of such discretion. It does not direct them to give or withhold interest. In his complaint plaintiff demanded judgment for $600 and interest. In his evidence his estimate of the damages was given with some latitude. His highest estimates upon the different items, if aggregated, would amount to more than $600; hence the instruction that in their verdict they could not go beyond the demand of the complaint, to wit, $600 and interest."

interest for yourselves, and you must not accept the statement furnished as being correctly calculated, but must calculate the interest correctly yourselves.[6]

§ 737. **Interest on Money Withheld by an Unreasonable and Vexatious Delay.** The court instructs you that if you find from the evidence and under the instructions of the court, that the plaintiffs are entitled to recover from the defendant, and if you find from the evidence that such money as you find the plaintiffs are entitled to, if any, was withheld by an unreasonable and vexatious delay of payment, then you may allow the plaintiffs interest at the rate of five percentum per annum on such sum, if any, as you believe from the evidence and under the instructions of the court, the plaintiffs are entitled to recover from the defendant from the date the same became payable, as may be shown by the evidence in the case; what the facts are you must determine from the evidence.[7]

§ 738. **Exemplary Damages Defined.** Exemplary damages mean damages given by way of punishment for the commission of a wrong willfully or wantonly, or with some element of aggravation. They are not the measure of the price of the property, or actual damage sustained, but they are given as smart money in the way of pecuniary punishment, to make an example for the public good, and to teach other persons not to offend in like manner.[8]

ATTACHMENT—GARNISHMENT.

§ 739. **Wrongful Attachment—Elements of Damage.** (a) If you should find that the writ of attachment in this case was wrongfully sued out, then the measure of defendant's damages on his counterclaim would be the fair cash value in the market of defendant's goods that were levied upon and sold under said writ of attachment, estimated at the time of said levy, with six per cent. per annum interest thereon from that time to the present. But you should exclude from said estimate any goods sold under the foreclosure of the chattel mortgage, on the attached property, and you must also deduct from the sum arrived at any amount in the hands of the sheriff that is

6—Joplin Co. v. City of Joplin, 177 Mo. 496, 76 S. W. 960 (967).

7—Fitzgerald v. Benner, 219 Ill. 485 (490, 499), 76 N. E. 709.

The court in comment said: "The evidence tended to show an unreasonable and vexatious delay of payment, and it was for the jury to say whether that delay was occasioned by the fault of the appellant. The delay of the architect was the delay of the appellant, as the architect was to a certain extent the agent of the appellant, and, according to the testimony of the appellees, acted under the instructions of the appellant in refusing to deliver the certificate. The instruction is not justly subject to the criticism, that it leaves the jury to estimate the amount of damages according to their own individual notions of right and wrong, because it specifically refers them to the evidence under the instructions of the court. Springfield Consolidated Railway Co. v. Puntenney, 200 Ill. 9, 65 N. E. 442."

8—Bates v. Davis, 76 Ill. 222.

ready to be turned over, and that is the proceeds of defendant's goods that were sold under said writ of attachment.[9]

(b) The court charges the jury that the elements of actual damages as claimed in this case are damages to the goods, attorney's fees in the attachment suit and in contest of exemptions, and in loss of credit and business, and they must look to the evidence for the amount of these damages.[10]

§ 740. Suspension of Business, Proper Element of Damage. The court instructs the jury, in case they find for the plaintiff, that in determining the amount of damages which the plaintiff is entitled to recover they are to consider not only the amount, if any, which the evidence in this case shows the goods in question were damaged while in possession of the sheriff, but also the actual loss, if any, which the evidence in the case shows the plaintiff sustained by reason of the suspension of business during the time he was prevented from carrying it on, by reason of the acts of the sheriff if the jury believe from the evidence in the case that plaintiff was prevented from carrying on his business by the acts of the sheriff.[11]

§ 741. Issuance of Attachment Without Statutory Grounds Therefor. (a) The court charges the jury that if they believe from the evidence that ———— was not about to fraudulently dispose of his property, and that no ground existed for the issuance of the attachment, then ———— would be liable for all actual damages that the evidence shows you the plaintiff has suffered.[12]

9—"The charge given by the court expressed the rule of damages applicable to cases of this kind." Blane v. Tharp, 83 Iowa 665, 49 N. W. 1044 (1046).

10—Vandiver & Co. v. Waller, 143 Ala. 411, 39 So. 137.

11—Kyd v. Cook, 56 Neb. 557, 76 N. W. 524 (527), 71 Am. St. Rep. 661. "We think that the instruction quoted was specific and definite enough. It limited the plaintiff's right to damages to the depreciation in value of the property seized, and the loss he had sustained by reason of the locking up of his store and the interruption of his business; and the jury, if it awarded the plaintiff any damages by reason of the suspension of his business, were bound to base such an award upon the evidence. What manner or method the jury should pursue in estimating the amount of the plaintiff's damages by reason of the suspension of his business was by the court left to the jury to determine."

12—Vandiver & Co. v. Waller, supra.

The court said in comment "the attachment was sued out upon the ground that the defendant in the attachment suit was about to fraudulently dispose of his property, so that ordinary process of law could not be served upon him. The breaches of the bond alleged in the complaint are that the attachment was wrongfully sued out; that it was wrongfully and vexatiously sued out; that it was wrongfully and maliciously sued out; that it was sued out without the existence of any statutory ground for the issuance of the attachment, and that the ground of attachment alleged in the affidavit was untrue, and there was no probable cause for believing the said alleged ground to be true. It is well-settled law that if an attachment is sued out without the existence of any statutory ground upon which to predicate the attachment it would be wrongfully sued out, and when wrongfully sued out the defendant in the attachment suit in an action on the attachment bond would be entitled to recover all actual damages which the evidence might show

(b) The court charges the jury that if they believe from the evidence that the suing out of the attachment was wrongful, as has been defined by the court, and that the attachment was issued without probable cause, punitive as well as actual damages can be recovered, though the attachment is sued out by an agent, if the principal, with full knowledge, ratified the act of the agent.[13]

§ 742. **Wrongful Attachment, Acts of Malice, Punitive Damages.** The court charges the jury that punitive or exemplary damages cannot be proven in dollars and cents, but when the proof shows acts of malice and vexation the jury alone can fix in dollars and cents the measure of damages for malicious and vexatious acts, and they, the jury, can fix such punitive damages as may seem right to them, not exceeding the amount of the attachment bond.[14]

§ 743. **Action on Garnishment Bond—Loss of Credit Business Injured.** (a) The court charges the jury that if the evidence shall satisfy their minds that the garnishment was sued out wrongfully, but not maliciously or vexatiously, then they can find for the plaintiff only such damages as it actually sustained from loss of credit or destruction of business by reason of the suing out and serving of the garnishment, and that the burden is upon the plaintiff to prove, first, that the plaintiff lost credit or had its business injured or destroyed by the suing out or levy of such garnishment, and, next, the amount of the damage resulting to it thereby. If the evidence shall fail to reasonably satisfy the minds of the jury that such loss of credit or injury or destruction of business was caused by the suing out or levy of the garnishment, then the jury cannot give the plaintiff more than mere nominal damages.

(b) If the jury find from the evidence that the garnishment was sued out wrongfully, but not sued out vexatiously or maliciously, they cannot give plaintiff damages for the loss of its credit, unless they

had accrued to the defendant in the attachment suit from such wrongful suing out of the attachment. This is all that was asserted by charge and the giving of it was not error. Kirksey v. Jones, 7 Ala. 622; Alexander v. Hutchison, 9 Ala. 826; Pollock v. Gantt, 69 Ala. 373, 44 Am. Rep. The charge, if just, only tends to show that the charge was misleading. If the defendants apprehend that the jury might, under the charge, award damages that were not recoverable, this was capable of correction by an explanatory charge which should have been requested by them. Durr v. Jackson, 59 Ala., bottom of page 210; 2 Mayfield's Digest, p. 573, Art. 214."

13—Vandiver & Co. v. Waller, supra.

Citing Baldwn v. Walker, 91 Ala. 428, 8 So. 364; Hamilton v. Maxwell, 119 Ala. 23, 24 So. 769; Jackson v. Smith, 75 Ala. 97.

14—Vandiver & Co. v. Waller, 143 Ala. 411, 39 So. 140.

"The amount claimed in the complaint is the same as the penalty of the bond, and while charge 13 instructed the jury that they might fix such punitive damages as might seem right to them, not exceeding the amount of the attachment bond, and on this account is informal, it is substantially correct in that respect. The charge asserts a correct rule of damages, and the court committed no reversible error in giving it. Floyd v. Hamilton, 33 Ala. 235; A. G. S. Ry. Co. v. Frazier, 93 Ala. 45, 9 So. 303, 30 Am. St. Rep. 28; Montgomery & E. Ry. Co. v. Malette, 92 Ala. 209, 9 So. 363.

further find from the evidence that said loss of credit was caused by the suing out of said garnishment.

(c) The court charges the jury that they cannot find exemplary or vindictive damages for the plaintiff, unless they are satisfied from the evidence that the garnishment was sued out maliciously or vexatiously, as well as wrongfully.

(d) The court charges the jury that, if they believe from the evidence that W. P., the plaintiff in the garnishment suit in which the bond sued out in this case was executed, believed the facts to exist authorizing the garnishment, and was not influenced by a reckless or vexatious spirit, they cannot find for the plaintiff other than its actual damages sustained thereby.[15]

CONTRACTS AND SALES.

§ 744. When Interest Allowed on Contract—Money Withheld Unreasonably. The court instructs you that if you find from the evidence and under the instructions of the court, that the plaintiffs are entitled to recover from the defendant, and if you find from the evidence that such money as you find the plaintiffs are entitled to, if any, was withheld by an unreasonable and vexatious delay of payment, then you may allow the plaintiffs interest at the rate of five per centum per annum on such sum, if any, as you believe from the evidence and under the instructions of the court, the plaintiffs are entitled to recover from the defendant from the date the same became payable, as may be shown by the evidence in the case. What the facts are you must determine from the evidence.[16]

§ 745. Refusal to Accept Personal Property—Difference Between Contract Price and Current Price at the Time and Place of Delivery. The jury are instructed, that the rule of law is, that when a purchaser of personal property which, by the terms of the purchase, is to be delivered at a specified time and place, and at a stipulated price, refuses to receive and pay for the property, and no part of the purchase price has been paid, and if the price has, in the meantime, declined, then, in an action by the vendor against the vendee for refusing to comply with contract, the proper rule of damages is the difference between the contract price and the current price at the time and place for delivery, as fixed by the contract of sale and purchase.[17]

15—Mobile Furniture Co. v. Little, 108 Ala. 399, 19 So. 443 (445), citing Calhoun v. Nannan, 87 Ala. 277, 6 So. 291; Ala. G. & S. R. Co. v. Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 652, 9 L. R. A. 442; O'Grady v. Julian, 34 Ala. 88; Durr v. Jackson, 59 Ala. 204; Flournoy v. Lyon, 70 Ala. 309.

16—Fitzgerald v. Benner, 219 Ill. 490, 76 N. E. 709; Springfield C. R. Co. v. Puntenney, 200 Ill. 9, 65 N. E. 442.

17—McNaught v. Dodson, 49 Ill. 446.

§ 746. Damages for Breach of Contract to Purchase Merchandise. If you find, from the evidence, that the defendant has failed and refused to take a portion of the wagons and extra boxes mentioned in the contract and pay for the same, and has thereby broken the contract in evidence, as charged in the declaration, then the plaintiff is entitled to recover damages in this case from the defendant for breach of such contract and for failure to take and pay for the wagons and extra boxes in question. The measure of plaintiff's damages in such case is the difference between what it would cost the plaintiff to make and deliver such wagons and extra boxes, and the price which the defendant agreed in and by its contract to pay the plaintiff therefor; and whatever the evidence shows the amount of these damages to be, it is your duty to assess the same in favor of the plaintiff.[18]

18—Kingman v. Hanna W. Co., 74 Ill. App. 22 (28), aff'd 176 Ill. 545 (551), 52 N. E. 328.

The court said in comment that "the general rule in law is stated to be that damages are to be assessed at the pecuniary amount of the difference between the state of the plaintiff upon a breach of the contract and what it would have been if the contract had been performed. In other words, the measure of damages is the benefit that the plaintiff would have received if the contract had been kept. He is, so far as money can do it, to be placed in the same situation as if the contract had been performed. Leake, Digest of the Law of Contracts, 1044 (ed. 1878). While the general rule is that where there is a contract to deliver goods at a certain price, the measure of damages is the difference between the contract price, because a seller may take his goods into the market and obtain the current price for them, yet, where, from the nature of the article, there is no market in which the article can be sold, this rule is not applicable. Leake, Digest of the Law of Contracts, 1060.

Under the circumstances of this case, the plaintiff had no market in which to sell the wagons manufactured by it. The contract gave the appellant the exclusive right to sell wagons of the Hanna Wagon Company's manufacture in the State of Illinois and many other States and territories, and hence it had no market in which to sell its product, and therefore the rule above mentioned did not apply and could not be adopted for ascertaining the damages.

In the case of Masterton v. The Mayor, etc., of Brooklyn, 7 Hill. (N. Y.) 61, 42 Am. Dec. 38, the plaintiff had contracted with the defendants for the furnishing and delivery of marble wrought in a particular manner so as to be fitted for use in the erection of a certain building, and was prevented from fully performing the contract by the default and refusal of the defendants. The plaintiff's claim was substantially one for not accepting goods bargained and sold. It was held that where the article sold has no market value, an investigation into the constituent elements of the cost to the party who has contracted to furnish it becomes necessary, and that compared with the contract price will afford the measure of damages. If the cost should equal or exceed the contract price, the recovery would be but nominal; if the contract price exceeds the cost, the difference would constitute the measure of damages.

The case of B. & O. Ry. Co. v. Stewart, 79 Md. 487, 29 Atl. 964, was an action for breach of contract made by the plaintiff with the B. & O. R. R. Co. for furnishing material and doing masonry work in the construction of a bridge. The trial court instructed the jury that the plaintiffs were entitled to recover such amount as the jury might find would compensate them for the loss, if any, which they might have suffered by reason of the stoppage of the work by the defendant, the measure of damages being the difference between what they would have paid for the entire work when completed at the contract price and

§ 747. Renunciation of Contract to Buy Property. When the defendant mailed to plaintiff the letter in evidence, declaring that he declined to have anything more to do with the contract, then the plaintiff had nothing further to do in the premises; this was a renunciation of the contract upon which the suit is founded. And the plaintiff is entitled to such damages as the jury may believe from the evidence he has sustained by reason thereof, not exceeding the sum of $500, the amount claimed in the petition. The measure of damages in this cause is the difference between the contract price of $—— to be paid plaintiff by defendant under the contract, and the market value of said property at the time of the breach of said contract ————, and when sold by plaintiff in ————, not exceeding $———, the amount claimed in the petition.[19]

§ 748. Refusal to Deliver Personal Property—Difference Between Contract Price and Market Price at Place of Delivery. In this case, if the jury, under the evidence and the instruction of the court, find the issues for the plaintiff, then the measure of damage is the difference between the contract price and the market price, at the place of delivery, at the time of the alleged breach of contract complained of. And in arriving at the amount of damages, the jury will estimate the quantity of (hops) which has not been delivered, and give the difference between the market price and the contract price on so much of the contract as the jury believe, from the evidence, remains to be performed.[20]

§ 749. Measure of Damages Where Property is Not Delivered Within Specified Time. (a) The jury are further instructed, that upon a breach of a contract to deliver articles of personal property, at a particular place, within a certain time, at a certain price, and when the property has been paid for, and subsequently delivered, but not delivered within the specified time, the measure of damages is the

what it would have cost the plaintiffs to do and complete the same. It was held that the instruction was proper.

In Hinkley v. Pittsburgh B. S. Co., 121 U. S. 264, 7 S. Ct. 875, the defendant had agreed in writing to purchase from the plaintiff rails to be rolled by the latter and drilled as should be directed by the defendant, and to pay for them $58 per ton. Defendant refused to give directions for drilling, and at its request the plaintiff delayed rolling any of the rails until after the time prescribed for their delivery, and then the defendant advised the plaintiff that he should decline to take any of the rails under the contract. It was held, first, that the defendant was liable in damages for the breach of the contract; second, that the plaintiff was not bound to roll the rails and tender them to defendant; and, third, that the proper rule of damages was the difference between the cost per ton of making and delivering the rails and the $58 contract price. The court cite approvingly the case of Masterton v. Mayor of Brooklyn, supra, following United States v. Speed, 8 Wallace (U. S.) 77; and United States v. Behan, 110 U. S. 338, 4 S. C. 81."

19—Wallingford v. Aitkins, 24 Ky. L. 1995, 72 S. W. 794 (795).

20—1 Sutherland on Dam. (3d Ed.) 46; Carney v. Newberry, 24 Ill. 233; Bush v. Holmes, 53 Me. 417; Cannon v. Folsom, 2 Ia. 101; Crosby v. Watkins, 12 Cal. 85; Zehner v. Dale, 25 Ind. 433.

difference in the value of the property at such place, at the time of actual delivery, and its market value at the same place at the time fixed in the contract for delivery.

(b) If the jury believe, from the evidence, that a contract was entered into by the defendant, as alleged, in plaintiff's declaration, for the sale of (thirty thousand brick), at the price of $—— (per thousand), to be delivered on demand, and that the plaintiff demanded said brick, as claimed by him, and that he was then ready and willing to pay for the same, and that upon such demand the defendant refused to deliver the brick, then, if you further believe, from the evidence, that the market price of the same kind of brick, at the time and place of such demand, was greater than the contract price, the measure of damages will be the difference between such market price and the price agreed upon.[21]

§ 750. **Property Bought for Re-Sale.** If, under the evidence in the case and the instructions of the court, you find for the plaintiffs, then, upon the question of damages, the court instructs you that if you believe, from the evidence, that at the time of said sale the plaintiffs had a contract for the re-sale of said hams at (Salt Lake City), and that they had sold the same as of the quality aforesaid, and that at the time of the sale to the plaintiffs the defendants had knowledge of such contract of re-sale, and knew that the plaintiffs purchased said hams to fill said contract for re-sale, and that the hams were shipped to the purchaser at (Salt Lake) before the plaintiffs had notice of their quality, and that upon their arrival at (Salt Lake) the said purchasers refused to receive or pay for the same, for the reason that they were not, at the time of their shipment to him, of the quality he had bargained for, then you will award to the plaintiffs, as damages, such sum of money as you may believe, from the evidence, the plaintiffs had re-sold the said hams for, less such sum as you may believe, from the evidence, said hams were actually worth at the time of their purchase by the plaintiffs; and you will further allow the plaintiffs such sums of money, if any, as you may believe, from the evidence, they were obliged to pay out on account of the transportation of said hams to (Salt Lake City.)[22]

§ 751. **Plaintiff Deprived of Opportunity to Perform His Contract—Gains Prevented by Breach.** (a) The court instructs the jury that their verdict shall be for the plaintiff, and the only question for the jury to consider is: What is a fair and adequate compensation to the plaintiff, as shown by the evidence, for the damage it has suffered by being deprived of its right to perform said contract, and reap the fruits thereof? The court instructs the jury that in determining this question they shall find for the plaintiff in such sum as they believe from the evidence plaintiff would have realized as profit upon the contract in evidence, if the plaintiff had not been prevented from per-

21—Sleuter v. Wallbaum, 45 Ill. 43.

22—Thorne v. McVeagh, 85 Ill. 81; Lewis v. Rountree, 79 N. C. 122.

forming that contract, if the jury find that plaintiff was so prevented; and the jury is instructed that they should consider what profits the plaintiff made upon said contract, as shown by the evidence, prior to the breach of said contract, the average of said profits, the nature and extent of the duties of plaintiff and defendant under said contract, in order to aid them in determining what profits plaintiff would have made during said period of ———— to ————, upon said contract.[23]

(b) The court instructs you that gains prevented, as well as losses sustained, may be recovered as damages for breach of a contract, when they can be rendered reasonably certain by evidence, and have naturally resulted from breach of contract.[24]

§ 752. **Breach of Contract to Ship Coal.** (a) If you find for the defendants on their counterclaim, the measure of their recovery is the difference between the price they agreed to pay the plaintiff for coal ordered and not shipped, and the price at which they could have obtained said coal from other persons; and, if they could not have obtained it from other persons, then the measure of their recovery would be the net profit they could reasonably have made on the quantity of coal ordered, but not furnished, but in either event not to exceed the sum of three thousand dollars.

(b) If you believe from the evidence that the defendants ordered coal from the plaintiff during the months of October, November and December, 1899, and during the months of January, February, March, June, July and August, 1900, and that the I. C. R. R. Co. supplied plaintiff with enough cars to ship to defendants the said coal to fill said orders, and if it failed to do so, and the defendants were damaged thereby, you will find for the defendants, on their counterclaim, such damages as they sustained, to be fixed by the criterion laid down in another instruction.

(c) When the defendants ascertained that they could not procure from the plaintiff the coal which the plaintiff had agreed to ship them, then it was the duty of the defendants to exercise reasonable efforts to procure coal from other persons, and, if they failed to do this, you cannot allow them anything on their counterclaim; but it was not the duty of the defendants to supply themselves with coal at a price at which there would be a loss on a re-sale to their customers.

(d) If you find for the defendants on their counterclaim, you will credit such amount on the amount due the plaintiff under the first instruction, and for the plaintiff the remainder. But if the amount you allow defendants exceeds the claim of the plaintiff, you will find a verdict for the defendants for the difference.

(e) The court instructs you that the defendants cannot recover

23—Laclede P. Co. v. Nash-Smith T. & C. Co., 95 Mo. App. 412, 69 S. W. 27 (29). See also Anderson v. McDonald, 31 Wash. 274, 71 Pac. 1037 (1039).

24—Silver Springs, O. & G. R. Co. v. VanNess, 45 Fla. 559, 34 So. 884 (889).

anything on their counterclaim, except for coal actually ordered by them from the plaintiff.[25]

§ 753. Defects in Articles Manufactured. (a) You are instructed that, if you believe and find, from the evidence, that the written instrument offered in evidence as the contract of January 1, 1897, between the plaintiff and defendant, was executed by the parties and approved by the board of directors of the plaintiff company, then such instrument constituted a binding contract between the parties for the purposes therein mentioned, and it became and was the defendant's duty and obligation to superintend the manufacture and shipment of such brake beams as were manufactured by or for the plaintiff at Detroit, Michigan, during the year 1897, and to cause the work to be done efficiently, promptly and to the reasonable satisfaction of the plaintiff, and if he failed to do so, and if you find, from the evidence, that by defendant's failure to so perform his duty in that behalf any break beams were not, between January 1, 1897, and September 5, 1897, manufactured to the reasonable satisfaction of the plaintiff, or were defectively manufactured, and rendered unfit for brake beams, and that the plaintiff suffered loss or damages thereby, then you are instructed that on this issue the defendant is guilty as alleged by the plaintiff, and your verdict must be for the plaintiff on this issue.

(b) If you believe, from the evidence, that by defendant's failure to perform his duty in that behalf any brake beams were not, between January 1, 1897, and September 5, 1897, manufactured to the reasonable satisfaction of the plaintiff, or were defectively manufactured and rendered unfit for brake beams, and that the defendant without instructions from the plaintiff and against its desires and instructions procured to be manufactured thirteen hundred special heads to fit said brake beams, if any so defectively manufactured, by reason whereof the cost of the manufacture of said special heads was lost to the plaintiff, then you are instructed that on this issue, the defendant is guilty of wrongful conduct and breach of duty as alleged, and your verdict as to this should be for the plaintiff.[26]

§ 754. Failure to Contribute Money to Joint Adventure. If the business venture failed by reason of plaintiff's breach of contract, defendants could recover as damages whatever loss was occasioned to them by reason of such breach. The damages must be such as grow directly out of the breach and would be limited to the actual expense incurred in changing over the heading business to the stave

25—Tradewater Coal Co. v. Lee, 24 Ky. 215, 68 S. W. 400 (402). "These instructions clearly and fully cover the law applicable to the facts of the case."

26—Pungs v. Am. Brake Beam Co., 102 Ill. App. 76 (85), affirmed in 200 Ill. 306, 65 N. E. 645 The appellate court said that taking the instructions as a series the use of the phrase "to the satisfaction of the plaintiff" did not make them erroneous. "They only allow a recovery, as we construe them, upon a showing by the evidence that the beams were ren-

business on account of the contract relations requiring that to be done. Of course you may take into account not only the expenses of changing over this mill as far as machinery is concerned, but the necessary labor, its fair value according to the proof, that would be an element of damage also.[27]

§ 755. Contract Providing Against Competition—No Damage Proven. In this case there is no evidence tending to show what part of the decrease in the business of R. & B., below that enjoyed by H. & Y., was caused by the competition of H., if any, in violation of his contract, what part was due to competition of H. under his written permission, what part was due to other competition than houses represented by H., or what part was due to lack of experience in the business on the part of R. & B., as compared with H. & Y. There is therefore no evidence upon which the court can submit the case to the jury upon which they could find the amount of damages caused by the breach of the contract on the part of H., if he did violate his contract by making sales which were not authorized by the written permit given him. No particular sales are proved to have been made in violation of the contract, from which the extent of the damages might be in part inferred. The jury will therefore return a verdict for the defendant.[28]

§ 756. Measure of Damages for Failure to Furnish Goods of the Quality Provided for in the Contract. (a) The rule of damages for a failure of a party to furnish goods of a quality provided for in a contract, in case such goods are received and appropriated by the other party, would originally be the difference in the market value at

dered unfit for brake beams by reason of their defective manufacture."

27—Alderton v. Williams, 139 Mich. 296, 102 N. W. 753-5.

"Notwithstanding the various objections urged by plaintiff, we think he cannot complain of this charge. In Harrow Spring Co. v. Harrow Co., 90 Mich. 147, 51 N. W. 197, 30 Am. St. Rep. 421, we said in a case like that at bar, 'the injured party is clearly entitled to recover his damages for expenses incurred in good faith in anticipation of performance by the other party.' This decision answers, with one exception, all of plaintiff's objections to the above charge. That exception arises from his contention that the measure of damages where one fails to advance money as agreed is the excess in interest which the borrower is compelled to pay to procure the money elsewhere. This principle is applied as appears from the cases cited by appellant, where the defaulting party failed to advance money which he had promised to loan. In such cases the law presumes that the borrower can obtain money elsewhere, and the increased rate of interest therefor furnishes full compensation for his damages. These cases and the principle underlying them have no application to the case at bar. Here plaintiff defaulted, not in making an agreed loan, but in contributing to a joint adventure. Even if defendants had the right to do so, it cannot be presumed that they could have obtained such a contribution from some other source. And we have held that when a joint adventure fails because one of the parties refuses to advance his agreed money contribution, he is liable for substantial damages. See McCreery v. Green, 38 Mich. 172."

28—Raymond v. Yarrington, — Tex. Civ. App. —, 69 S. W. 436 (437), 62 L. R. A. 962.

the place of delivering between the articles of the quality contracted for and the articles as delivered. But in this case the defendants having claimed that they were put to great expense in screening the material delivered to them by the plaintiff, by reason of its being of different quality from that contracted for, they are not entitled, as damages, to a deduction from the contract price in order to reduce the material which was furnished to its market value, and also to damages for the expense they were put to in screening the gravel.

(b) If you shall find from the testimony that the plaintiffs guaranteed that the unscreened gravel, which they were to furnish the defendants, should be of a certain quality, and also that it was not of such quality, and if you can ascertain from the testimony what additional expense, if any, the defendants were put to, in order to prepare such gravel for the use for which it was furnished, which they would not have been put to if it had been such as the guaranty called for, then, and in that case, you may allow such additional expense as damages to the defendants. If, however, the testimony is not sufficiently definite to enable you to make such computation, then you may, if you shall find as above stated, allow as damages to the defendants the difference between the market value at L. of the material as it was contracted for and of the quality contracted for, and the market value of the material at L. as it was then delivered to defendants.[29]

(c) If you find damages in favor of the defendants in this case, the measure of damages would be, if any, the difference in the value of the yarn for the purposes for which it was bought as it was contracted to be delivered, and the yarn as it was in fact, and in addition to this you may allow such damages, if any, as was done to the machinery of defendants in giving the yarn a fair trial, or such damages, if any, as occurred from loss of time in making the trial, provided the defendants exercised ordinary care in making the trial, and no loss or damage to defendants, which might have been avoided by the exercise of ordinary care in the proper course and management of their business, can be allowed to them against plaintiffs.[30]

(d) You are instructed that if you find from the evidence in this action that the defendant knew the purpose for which this cement sold to the plaintiff was to be used, and warranted the same to be good cement, suitable for the purpose for which they knew it was to be used, and you further find from the evidence that the cement in

29—Clarke v. Van Court, 34 Neb. 154, 51 N. W. 756 (758-9).

30—Knoxville Woolen Mills v. Wallace, 28 Ky. Law 885, 90 S. W. 563.

"If the court erred in not limiting the amount of recovery on each item, the error did not prejudice the substantial rights of appellant. The jury did not award appellees as much as was claimed in the pleading, nor as much as was shown by the proof. The witnesses were questioned on each item of the claim, and they fixed the damages separately, and not above the amount claimed in the pleading; and it ought not to be presumed that the jury erred by allowing more upon any item than was claimed and proven."

question was not good cement, and was not suitable for the purpose to which the defendant knew it was to be put, then your verdict should be for plaintiff, and you will determine from the evidence what damage the plaintiff has sustained, and allow him by your verdict such amount as the evidence shows is the damage so sustained, bearing in mind that the plaintiff is entitled to recover in that event such damages as may be reasonably supposed to have been contemplated by the plaintiff and defendant at the time the cement in question was sold, as appears from the evidence and pleadings in the action.[31]

(e) The court instructs the jury that if you believe from the evidence in this case, that the defendants sold to the plaintiff the combination mattresses and springs in evidence, and that at the time of said sale they represented that they were of a first-class quality and make and were suitable for use in a first-class hotel, and, if you further believe from the evidence, that such combination mattresses and springs were not of the quality and kind contracted to be delivered, but were of an inferior kind and quality and not suitable for use in a first-class hotel, and if you further believe from the evidence that such combination mattresses and springs were of less value owing to such inferior kind and quality, if any, than the contract price agreed to be paid therefor at the time of such sale, then the plaintiff would be entitled to recover in this action such difference in value, and your verdict should be for him.[32]

§ 757. **Damages for Defective Setting of Furnace—Placing Furnace by Request of Defendant.** The court instructs the jury that although you may find, from a preponderance of the evidence in this case, that the furnace in question was sold by this plaintiff, and that said furnace was improperly set, and that the registers and other fixtures and appurtenances belonging to said furnace were improperly arranged and located, and that, consequently, defendant's house was damaged, and not heated, still the jury cannot, under the law, allow the defendant any damages in their verdict because of such defects in the setting, arrangements, and locating of said furnace, provided the jury believe that said furnace, registers, fixtures, and appurtenances were placed where defendant requested them to be placed, and that such failure was caused by the order of defendant.[33]

§ 758. **Measure of Damages for Non-Payment—Unreasonable and Vexatious Delay—Interest.** You are instructed that if you find from the evidence that on or about the 15th day of November, 1894, the defendants bought of the plaintiff a certain quantity of lumber, and that said lumber was delivered to the defendants at Chicago on or about the 3rd day of January, 1895, and that the defendants have failed, neglected and refused to pay the plaintiff for said lumber

31—Nye & Schneider Co. v. Snyder, 56 Neb. 754, 77 N. W. 118 (120).

32—Haines v. Neece et al., 116 Mo. App. 499, 92 S. W. 922.

33—Richardson & Boynton Co. v. Winter, 38 Neb. 288, 56 N. W. 886 (887).

according to their agreement, and if you further find that there has been an unreasonable and vexatious delay on the part of the defendants in paying the money so due to the plaintiff, then you will find the issues for the plaintiff and assess the plaintiff's damages at such sum as you find was due the plaintiff on the 17th day of February, 1895, with interest thereon from that date until the present time at five per cent per annum.[34]

§ 759. Punitive Damages Not Allowable in Suit on Contract. (a) In a suit for breach of contract, the court has no jurisdiction to award punitive damages, although such damages are alleged in the petition and such allegation is not demurred to at the proper time.[35]

(b) The court instructs the jury that, if the plaintiff has any right to recover in this case, he can only recover actual damages or such damages as will make good the actual loss sustained by him; and you cannot award exemplary or vindictive damages; you must ascertain the loss, if any, sustained in dollars and cents, as nearly as you can approximate thereto.[36]

§ 760. Damages—Amount Expended in Removing Defective Pipes Not Reasonably Fit for the Purpose Intended—Series. (a) The court instructs the jury that if you find for the defendant upon its counterclaim, you will assess its damages at such reasonable sum as you may find that defendant was compelled to expend in removing and replacing such defective pipe and fittings.

(b) The court instructs the jury that the defendant cannot recover upon its counterclaim in reference to time and labor expended in using or replacing the pipe or fittings furnished by plaintiff, unless defendant has proven to your satisfaction by a preponderance of the evidence that said pipe or fittings were not reasonably fit for the purpose for which they were sold to the defendant and that the defendant was damaged thereby.

(c) In this case the defendant files a counterclaim for damages growing out of an alleged breach of warranty, alleged to have been entered into with the plaintiff, and as to this counterclaim the court instructs you as follows: If you find and believe from the evidence that, at the time of the purchase of the pipe and fittings in controversy, the plaintiff knew that said pipe and fittings were purchased to be used in the manufacture of certain ice machines, and were required to be of a certain strength and character, and the plaintiff agreed with the defendant to furnish pipe and fittings of that strength and character, and if you find from the evidence that the plaintiff failed to furnish pipe and fittings of the strength and character ordinarily used in the manufacture of ice machines, then you will find for the defendant. The court instructs you that the burden of proof is upon the defendant to show by a preponderance of the testimony,

34—Weise v. Gray's H. C. Co., 111 Ill. App. 647 (650).

35—Ford v. Fargason, 120 Ga. 708, 48 S. E. 180, citing Francis v. Wood, 75 Ga. 648.

36—City of Jacksonville v. Doan, 145 Ill. 23 (28), 33 N. E. 878.

that is to say, by evidence which you deem more credible and of more weight than that offered by the plaintiff, that it agreed to furnish pipe and fittings of the strength and character ordinarily required in the manufacture of ice machines, and also that it failed to furnish pipe and fittings of such strength and quality as are ordinarily used in the manufacture of ice machines, and that it was damaged thereby; and, unless you believe that the defendant established these facts by a preponderance of the testimony, you will find for the plaintiff upon defendant's counterclaim.

(d) If the jury believe from the evidence that the tubing furnished by plaintiff to the defendant possessed a commercial value, and that the defendant received the same and used it, then it is the duty of the jury to return a verdict in favor of plaintiff upon its several causes of action for the amount of principal sued on each cause of action, together with interest at the rate of —— per cent. per annum from the date of maturity of the acceptances and note and account upon which this suit is based; and this, irrespective of what the jury may regard it their duty to do as to defendant's counterclaim.

(e) If, on the other hand, you believe that the defendant ordered from plaintiff the pipe and fittings in controversy, and that said articles were of a kind and description known to the trade and to manufacturers, and if you believe from the evidence that the only agreement between the parties was that the plaintiff agreed to sell and the defendant agreed to buy of the plaintiff from 50,000 to 75,000 feet of extra strong one-inch pipe, then the court instructs you, as a matter of law, that there was no warranty that the pipe furnished would answer the purpose for which the pipe was purchased by the defendant, although you may believe from the evidence that the plaintiff knew the purpose for which it was to be used, and defendant is not entitled to recover on account of any defective pipe shipped under such an agreement.[37]

§ 761. Building Contracts—Defective Construction. The measure of damages in the case is the difference, if any, between the market value of the building constructed as it is and what it would have been if it had been constructed according to the contract.[38]

§ 762. Discharge of Servant—Actual Loss of Wages, if Immediate and Direct Result, Measure of. (a) If the jury find a verdict for the plaintiff, then in assessing his actual damages they may allow him such sum as will compensate him for the actual loss of wages, if any be proven, as was the immediate and direct result of the wrongful acts of the defendant, as alleged in his declaration.[39]

37—National T. W. Co. v. Ice Mach. Co., — Mo. —, 98 S. W. 620.

38—Taulbee v. Moore, 21 Ky. L. 378, 51 S. W. 564 (565).

39—London G. & A. Co. v. Horn, 101 Ill. App. 355 (357), aff'd 206 Ill. 493, 69 N. E. 526.

"Complaint is made of the instruction given by the court of its own motion because that, inasmuch as the employment of appellee could have been terminated at the will of his employer, the damages could in no event have been more than nominal. See

(b) In case you should be of the opinion that the services of the plaintiff were of value to the defendant, you must determine the value of such services, under all the credible evidence in the case, at any amount up to the amount of $——.[40]

§ 763. Discharge of Employe—Tendering Employment in Same City, Same Business, Same Salary, and Same Duties, Good Defense. (a) If you believe from the evidence that before the relation of employer and employe was severed as between the plaintiff, K., and defendant, W. Company, that defendant offered or tendered plaintiff employment at the same salary as plaintiff was then getting, and for the same length of time that plaintiff was then employed for, and in the same city as plaintiff was then working in, and in the same class of business, and with the same duties that plaintiff was then performing, then, in that event, you will find for the plaintiff against defendant for the sum of only $——, without interest.

(b) If you believe from the evidence that defendant, W. Company, instructed the plaintiff, K., to remove his headquarters from store No. 4 to store No. 5, and that such instructions were under all the circumstances in evidence reasonable and within the scope of defendant's authority over plaintiff, and if you should believe that plaintiff failed to obey such instructions and left defendant's service by reason of same, then, in that event, you are instructed to find for the plaintiff against said defendant in the sum of $138 only, without interest.[41]

Doremus v. Hennessy, 176 Ill. 608 and 614, 52 N. E. 924, 68 Am. St. Rep. 203, 43 L. R. A. 797, and Chipley v. Atkinson, 23 Fla. 206, 1 So. Rep. 934, 11 Am. St. Rep. 367. What has been said and the authorities cited, we think sufficient to dispose of this contention, and especially in view of the fact that the instruction confines the jury to the giving of compensatory damages only. The evidence amply sustains the amount of the verdict in every regard. It tends to show that but for appellee's discharge he would have earned more between the time of his discharge and the trial of the cause, after deducting all that he actually earned, than he was awarded by the jury."

40—Ladd v. Witte, 116 Wis. 35, 92 N. W. 365 (367).

41—Wolf Cigar Stores Co. v. Kramer, — Tex. Civ. App. —, 89 S. W. 995.

"The undisputed evidence showed that the appellant tendered to appellee the opportunity of continuing in its service for the entire unexpired term of the contract, at the same compensation as that expressed in the contract, in the same line of business, in the same city, and only a short distance from the place where he had been performing his work, with the same duties practically as those stipulated in the contract, which proposition plaintiff declined and left appellant's employment. At the time there was due him $138 on accrued salary. This amount was tendered to plaintiff, and he refused to accept the same. The tender was also duly made in the pleading of defendant. It has been held, and we think correctly, that where a discharged employe is offered the same or like employment to that from which he has been discharged, for the same period and upon the same terms, and before he has sustained any injury by reason of the discharge, no damages are recoverable by him by reason of his discharge. Tex. Ben. Ass'n. v. Bell, 3 Willson, Civ. Cas. Ct. App. Par. 277. See also, Weber Gas, etc. Co. v. Bradford, 34 Tex. Civ. App. 543, 79 S. W. 47; Mudgatt v. Tex. Tobacco Co. — Tex. Civ. App. —, 61 S. W. 150; Allgeyer v. Rutherford, — Tex. Civ. App. —, 45 S. W. 628; Lichtenstein v. Brooks, 75 Tex. 196, 12 S. W. 975; Wait's Actions and

§ 764. **Action for Commissions.** (a) If you find there was no contract for a certain amount of commissions, expressed or implied, and find for the plaintiffs, then in that case you will find for the plaintiffs such an amount as you believe from the evidence before you is a fair and reasonable compensation for the services performed.

(b) If you find for the plaintiffs, and further find that plaintiffs had with defendants a contract, either expressed or implied by the conduct of the parties, for $——, then you will find for the plaintiffs the amount so expressed or implied by the contract, if any you find.[42]

CONTRACTS OF MARRIAGE—BREACH OF.

§ 765. **Breach of Promise to Marry—What to Consider in Assessing Damages—Length of Time, Etc.** The jury are instructed, that should they find for the plaintiff, they alone are the judges of the amount of damages to be found, and in fixing the amount of such damages, the jury may take into consideration the length of time the parties were acquainted, the degree of intimacy existing between them, so far as proved, and all the injuries shown to have been sustained, whether they be from anguish of mind, blighted affections, or disappointed hopes, and fix the amount of such damages at such a sum as they think proper, under the evidence and the instruction of the court.[43]

§ 766. **Character and Habits of Plaintiff—What May Be Shown in Mitigation.** The jury are instructed, that in assessing damages for the breach of a marriage contract, the general rule is, that the jury may take into consideration all the injury, which the evidence shows the plaintiff has sustained, and no more; and in this case, if the jury find the issues for the plaintiff, the jury may take into consideration the character and habits of the plaintiff, so far as they are proved by the evidence; and if the jury believe, from the evidence, that at the time of the alleged breach of contract, the plaintiff was addicted to lewdness, drunkenness, or to the use of profane language, and if the defendant knew of such conduct at the time the contract of marriage was made, then these circumstances should be considered by the jury in estimating the injuries sustained by her.[44]

Defenses, 456; Sutherland on Dam., vol. 2, p. 473; Wood Master and Serv., 244; Greenleaf on Ev., par. 261a; Heckscher v. McCrea, 24 Wend. 304; Am. & Eng. Enc. of Law, vol. 20 (2d Ed.), pp. 34, 35. This principle is especially applicable to this case, for the undisputed testimony is that before the plaintiff left the employment of defendant such an offer was made. Plaintiff voluntarily declined the offer and elected to abandon the employment.

"Above special charges should have been given by the court, and their refusal was error."

42—Ellis v. Kirkpatrick & Skiles, 32 Tex. Civ. App. 243, 74 S. W. 57 (58).

43—3 Sutherland Dam. (3d Ed.), sec. 968; Sedg. Dam., 235, 426; Kniffen v. McConnell, 30 N. Y. 285; King v. Kersey, 2 Ind. 402; Roper v. Clay, 18 Mo. 383.

44—Sutherland Dam. (3d Ed.), sec. 163; 3 Id. sec. 990; Sedg. Dam., 428; Burnett v. Simpkins, 24 Ill. 264.

§ 767. Seduction of Plaintiff After Contract of Marriage Was Made—Aggravation of Damages. (a) If the jury believe, from the evidence, that the defendant entered into a marriage contract with the plaintiff, and also that he did seduce her, then they have a right to determine, from all the facts and circumstances, whether such seduction was consequent upon the promise of marriage, and if they so find, then the seduction may be taken by the jury in aggravation of the damages in this case, provided they find for the plaintiff under the first (or other appropriate) count of the declaration.

(b) In this suit, if the jury believe, from the evidence, that the defendant entered into a marriage contract with the plaintiff, and afterwards refused to carry out the same, as charged in the declaration, and further, that the defendant, under such promise of marriage, seduced the plaintiff and begot her with child, then that circumstance may be taken into account by the jury in estimating the plaintiff's damages.[45]

(c) If the jury believe, from the evidence, that the defendant entered into a marriage contract with the plaintiff, within five years before the commencement of this suit, and that under the pretense of such promise of marriage, he seduced and got the plaintiff with child, and then neglected and refused to marry the plaintiff, these circumstances and such violation of faith may be taken into consideration by the jury in estimating the plaintiff's damages.

(d) If the jury believe, from the evidence, that the defendant in this case has attempted to prove that the plaintiff was a lewd or base woman, and was of immoral or bad character, and that he has failed to establish and prove the same by a preponderance of evidence, and that such attempt was not made in good faith, or was made without any reasonable hope or expectation of establishing such facts, then such charge and failure on the part of the defendant may be taken in aggravation of the damages in this case; provided, the jury find the issues for the plaintiff.[46]

(e) The court instructs the jury that if you find that the plaintiff, while attempting to carry out a contract for marriage, entered into by herself and the defendant, left the Indian Territory with the defendant, and was seduced by the defendant, you may consider the act of the seduction as an aggravation of the damages resulting to the plaintiff from the failure of the defendant to carry out the said contract of marriage.

(f) And the court further instructs you that if you find from the evidence that the defendant made a contract for marriage with the plaintiff, as set forth in these instructions, and afterwards refused to carry out the same, and after such refusal circulated the fact of his

45—Tubbs v. Van Kleek, 12 Ill. 446; Sheahan v. Barry, 27 Mich. 217; Williams v. Hollingsworth, 6 Baxt. (Tenn.) 12; Wilde v. Bagan, 57 Ind. 453.

46—3 Suth. Dam. (3d Ed.), secs. 984, 985; Sedg. Dam., 427; Fidler v. McKinley, 21 Ill. 308; Davis v. Slagle, 27 Mo. 600; Denslow v. Van Horn, 16 Ia. 476.

seduction of the plaintiff, and of his relations with her, that you may take such conduct on the part of the defendant into consideration in determining the measure of damages to be awarded plaintiff.[47]

CONVERSION.

§ 768. Value of Property at Time of Conversion with Interest. (a) If, under the evidence and the instruction of the court, the jury find the defendant guilty of the taking and conversion of the property in question, in manner and form as charged in the declaration, then the measure of the plaintiff's damages is the value of the property at the time of the conversion, as shown by a preponderance of the evidence, with six per cent. interest thereon, from the time of such conversion.[48]

(b) If, under the evidence and the instructions of the court, you find the defendant guilty, then the measure of the plaintiff's damages will be the value of the property at the time of the conversion, and six per cent. interest thereon since that date.[49]

§ 769. Conversion of Cross-Ties. The court instructs the jury that it is the law in this case that if the railroad company purchased these ties, and that they were taken from the land of plaintiffs by willfull trespassers, the measure of damages is the value of the cross-ties at the time of the purchase by the railroad company.[50]

47—Davis v. Pryor, 3 Ind. Ter. 396, 58 S. W. 669 (665).

The court said: "It is well settled that evidence of seduction is admissible in aggravation of damages, as charged by the court. Appellant fails to cite any authority to sustain the proposition that evidence of the seduction beyond the territorial limits of the state or territory where the promise was made or the suit is pending is inadmissible."

48—1 Sutherland Dam. (3d Ed.), sec. 105; Sedg. Dam., 547; Tenney v. State Bank, etc., 20 Wis. 152; Yates v. Mullen, 24 Ind. 277; Polk v. Allen, 19 Mo. 467; Cutting v. Fanning, 2 Ia. 580; Repley v. Davis, 15 Mich. 75.

49—Tenney v. State Bank, etc., 20 Wis. 152; Hurd v. Hubbell, 26 Conn. 389; Yates v. Mullen, 24 Ind. 277; Polk v. Allen, 19 Mo. 467; Cutter v. Fanning, 2 Ia. 580; Repley v. Davis, 15 Mich. 75.

50—Birmingham Mineral R. Co. v. Tenn. C. I. & R. Co., et al., 127 Ala. 127, 28 So. 679 (681).

"Ordinarily the measure of damages in trover, when the property has been wholly lost, and when, as in this case, its market value is not shown to have fluctuated, is the value of the property at the time and place of conversion, with interest to the time of trial. Street v. Nelson, 67 Ala. 504; Linam v. Reeves, 68 Ala. 89; Burks v. Hubbard, 69 Ala. 379. Respecting property such as timber and mineral, which has been a part of land, and has become personal property by having been detached therefrom without the owner's consent, a peculiar principle has been evolved, probably to lessen hardships resulting from uncertainties of boundary or title. Under it, one who, at the cost of labor or skill, has developed into a more valuable species of property something he has inadvertently severed from another's land, may when sued in trover, be allowed an abatement in damages to the extent of the added value; and the same rule prevails when trover is brought against the unintentional trespasser's innocent vendee, who is treated as standing in the shoes of his innocent vendor. White v. Yawkey, 108 Ala. 270, 19 So. 360, 32 L. R. A. 199, 54 Am. St. Rep. 159; Winchester v. Craig, 33 Mich. 205; Bolles Wooden Ware

§ 770. **Conversion of Timber and "Iron Dogs."** Now, there is evidence, also,—whatever you may think of the evidence—that some articles, called "iron dogs," went along with the timber, and got into the possession of the defendants, I think, in fact, the defendants acknowledge that there are some of these articles in their possession, and have been. They follow the same rule as the timber. The damage is just what they were actually worth at that time and place. I do not know how many you will find that the defendants have ever had anything to do with.[51]

§ 771. **Cutting, Carrying Away and Destroying Timber.** (a) The court instructs the jury that if they shall believe from the evidence that the defendant, by its agents, servants, and employes, cut or destroyed or carried away, or converted to its own use any timber on the lands of plaintiffs other than that which it had contracted for in the three contracts read to the jury, they should find for the plaintiffs such a sum in damages as they believe from the evidence plaintiffs have sustained thereby, if any, not exceeding the sum of $——, the amount claimed in the petition.

(b) The court instructs the jury that the measure of damages is the reasonable value of the timber at the time it was cut.[52]

(c) The court instructs the jury that if they believe from the evidence that the plaintiff is the owner of the land mentioned and described in the petition, and they further believe from the evidence that the timber sued for was on said land, they should find for the plaintiff the damages sustained by the reason of the cutting of said

Co. v. U. S., 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230. This is an exception to the general rule and does not apply when the severance was wilful; nor does it appear that there is sufficient reason or necessity for extending it in favor of the wilful trespasser's vendee, though he be guiltless of intentional wrong. It is upon the theory and fact of ownership in the property in its improved form that the recovery might have been had in such case of the vendor, and it must be by a questionable invention of doctrine if a right can be accorded to the trespasser, or allowed to his vendee, to restrict the owner's rights by a transfer of the property between themselves. A consideration opposed to allowing the abatement for the assessed value in such case is forcibly stated in Bolles Wooden Ware Co. v. U. S., supra, where it was said it would have effect to give encouragement and reward to the wrongdoer by providing a safe market for what he has stolen and compensation for the labor he has been compelled to do to make his theft effectual and profitable. The case of Railroad Co. v. Hutchins, 37 Ohio St. 282, holds and presents in perhaps its strongest light the opposite view; but a dissenting opinion was there rendered by Chief Justice Boynton which in line with the Bolles Wooden Ware case, supra, denies the asserted right of a vendee to abate when his vendor could not. We accept this view as being in consonance with the weight of authority, and with the legal axiom that no man is to be deprived of his property except by his consent or by operation of law. It follows the court did not err in giving above charge."

51—No error can be found in this. The judge practically told the jury to give the plaintiff the value of such dogs as they should find defendant to have had." Davidson v. Kolb, 95 Mich. 469, 55 N. W. 373 (374).

52—Gray Tie Co. v. Clark, 30 Ky. Law 409, 98 S. W. 1000.

timber by defendant, not to exceed the amount sued for, namely: $——.

(d) If the jury believe from the evidence that the defendant is the owner of the land mentioned and described in her answer herein, and that the timber mentioned in the petition was included in her boundary, then they should find for the defendant.[53]

§ 772. **Removal of Partition Fence.** (a) The measure of plaintiff's recovery under first count in the complaint, if the jury should find from the evidence that plaintiff is entitled to recover under the first count, is the amount of plaintiff's interest in the value of the rails that were converted by the defendant, if they find from the evidence that the defendant converted them, with interest on that sum, from the time they were converted up to the present time.

(b) If the jury find from the evidence that the fence in controversy was a partition fence, and the premises inclosed by it were not in the possession of a tenant of plaintiff at the time it was removed, and that plaintiff is entitled to recover under the first count of the complaint, then plaintiff is entitled to recover under said first count only half of the value of the rails that were converted by the defendant, with interest thereon from the time of the conversion up to the present time.[54]

CRIMINAL CONVERSATION—SEDUCTION.

§ 773. **What May Be Considered in Assessing Damages—Relations between Plaintiff and His Wife—Statements of Wife to Plaintiff.** Evidence has been admitted tending to show that the wife of the

53—Commonwealth v. Turnpike Co., — Ky. —, 97 S. W. 375.

"It is insisted by the appellant that these instructions as given by the court did not submit to the jury the true issue involved in this suit, but left the jury to speculate, without directions or limitations on their power, as to where the boundary line between plaintiff's and defendant's land was located. But we are unable to find in the record where plaintiff offered any instruction in lieu of those given by the court, and he cannot complain because the court refused to give instructions asked for by the defendant, as he did not join the defendant in asking for these instructions. It is now a well-settled rule of this court that a litigant cannot complain of instructions, correct in themselves, though inadequate, given by the court, unless he offered additional instructions to be given in lieu thereof. In the case of the City of Louisville v. Keher, 25 Ky. Law Rep. 2003, 79 S. W. 270, this court said: 'It is incumbent upon litigants to ask for such instruction as they deem proper.' In L. & N. Ry. Co. v. Roberts, 24 Ky. Law Rep. 1160, 70 S. W. 833, the court said: 'It has been so frequently held that it is deemed unnecessary to again elaborate the idea that, in a civil case, unless the objecting party offers an instruction covering the point of his objection, he will not be heard upon an appeal to complain of the inadequate instruction given.' In L. & N. Ry. Co. v. Harrod, 25 Ky. Law Rep. 250, 75 S. W. 233, the court said: 'The rule upon that question now is that, where a party in a civil case fails to offer an instruction upon a point of law involved in the case, it is not error in the court to fail to instruct on that point. These cases seem to be conclusive upon appellant's right to complain because of the instructions given by the court."

54—Garrett v. Sewell, 108 Ala. 521, 18 So. 737.

plaintiff made statements to him respecting her relation with the defendant, and showing the relations between the plaintiff and his wife since the time of such communication. You are instructed that you cannot consider the statements of the plaintiff's wife to him, nor their conduct or relation since that time in determining the question whether or not defendant has had sexual intercourse with said wife; but if you find from the other evidence in the case that defendant did have such sexual intercourse, you may consider the relations existing between the plaintiff and his wife since the time it is claimed she made statements to plaintiff, as above suggested, in determining the damages that plaintiff has sustained, if any, by reason of such acts of the defendant; but such damages cannot be increased because of any unreasonable conduct, if any, of the plaintiff.[55]

§ 774. Wounded Feelings and Affections of Husband—Domestic and Social Relations. The jury are instructed that, if you find for the plaintiff, in estimating the injury he has sustained, the jury may take into consideration the wounded feelings and affections of the husband, the wrong done to him in his domestic and social relations, the stain and dishonor he has sustained, and the grief and affliction suffered, in consequence of the act complained of, and give damages accordingly.[56]

§ 775. Debauching Plaintiff's Wife Without the Aid or Procurement of Plaintiff. If you find from the evidence that the defendant carnally knew and debauched plaintiff's wife without the aid or procurement of plaintiff, then you will consider and determine the amount of damages to be assessed against the defendant.[57]

55—Ball v. Marquis, 122 Iowa 665, 98 N. W. 691 (692).

56—Smith v. Meyers, 52 Neb. 70, 71 N. W. 1006 (1008).

"The elements of damages enumerated in this paragraph of the charge were proper subjects for the consideration of the jury in reaching a verdict, and it is an unfair criticism of this instruction, when read in the light of the remainder of the charge, to say that the court assumed plaintiff had sustained all those different items of damages. If the mere statement of the elements which the jury might consider in fixing the amount of recovery created an impression unfavorable to defendant, he is to blame for having so acted as to cause a judicial investigation of the facts. Plaintiff was not limited in the amount of recovery to such sum as would merely compensate him for loss of services of the wife during the time they were separated. Using the language of Chief Justice Walker in Yundt v. Hartrunft, 41 Ill. 12: 'In this class of cases the loss of services may be alleged injury, but the injury to the character of the family is the real ground of recovery when the cause of action relates to the wife or daughter. The degradation which ensues, the distress and mental anguish which necessarily follow, are the real causes of recovery. It has not been the policy of the law to confine the recovery by the injured party to the precise amount of money which he has proved he has lost by the deprivation of labor ensuing from the injury. But the law has, in a more just spirit, allowed a recovery for injury to family reputation and anguish growing out of the injury.' See Stumm v. Hummel, 39 Iowa 478; Long v. Boe, 106 Ala. 510, 17 So. 716; Rice v. Rice, 104 Mich. 371, 62 N. W. 833; Cross v. Grant, 62 N. H. 675, 13 Am. St. Rep. 607."

57—Lee v. Hammond, 114 Wis. 550, 90 N. W. 1073 (1075).

§ 776. Compensation for Injury and Damage Suffered—Shame and Ridicule, Mental Anguish and Distress. (a) The jury are instructed that the law forbids the debauching of a man's wife. And if a man violates the sanctity of another's household by having carnal intercourse with another's wife, the person so offending is liable in damages to the party injured for such misconduct.

(b) And if the jury believe from the evidence that the defendant had carnal intercourse with the wife of the plaintiff, as alleged in the petition herein, then your verdict should be for the plaintiff, in such sum as you believe from the evidence will compensate him for the injury and damage he has suffered, not exceeding the amount claimed in the petition. And, in determining the amount of such damages, you should take into account the shame and ridicule plaintiff is subject to, and the mental anguish and distress he would necessarily suffer by the action of the defendant.[58]

§ 777. Seduction—What May Be Considered in Assessing Damages. The jury are instructed that in fixing the damages you are to consider, first, loss of time by plaintiff, the expense incurred for medical attendance while sick and the like; second, physical suffering; third, the mental anguish, loss of character and social standing, and sense of shame caused by the seduction.[59]

INTOXICATING LIQUORS.

§ 778. Death from Intoxication—Suit by Widow—Exemplary Damages—Aggravating Circumstances. (a) If the jury find, from the evidence, under the instructions of the court, that the defendants, or either of them, are guilty, as charged in the declaration, and that the plaintiff has suffered actual damages, then it will be the duty of the jury to assess the amount of such actual damages; and if the jury further believe, from the evidence, that there were any willful, wanton and aggravating circumstances attending the sale of said intoxicating liquors, then the jury may, in addition to such actual damages, find such further exemplary damages as they shall deem proper, not to exceed in amount the sum of $——, demanded in the declaration.

(b) The court instructs the jury that in a suit by a wife for injury to her means of support, caused by selling liquor to her husband, she cannot recover exemplary damages, unless the jury find, from the evidence, that she has sustained actual damages.[60]

(c) Although the jury may, in this class of cases, give exemplary damages if they find the defendant guilty, and further find, from the evidence, that the plaintiff has sustained any actual damages, yet

"We perceive no reversible error in the charge of the court, Matheis v. Mazet, 164 Pa. 580, 30 Atl. 434."

58—Smith v. Meyers, 52 Neb. 70, 71 N. W. 1006 (1008).

59—Lampman v. Bruning, 120 Ia. 167, 94 N. W. 562 (564).

60—Graham v. Fulford, 93 Ill. 596; Gilmore v. Mathews, 67 Me. 517.

the jury cannot give any damages by way of punishment to the defendant, unless they believe, from the evidence, that the plaintiff has sustained some actual pecuniary damages; nor should they give exemplary damages, unless they find, from the evidence, some circumstances of aggravation in connection with the conduct of the defendants (or some of them) calling for such damages.[61]

§ 779. What to Consider in Determining Whether to Give Exemplary Damages. If, under the evidence and the instruction of the court, the jury find the defendant guilty, and they further believe, from the evidence, that the plaintiff B. has suffered any pecuniary loss in her means of support in consequence of, etc., then if you further believe, from the evidence, that she has been excluded from society on account of her husband's habits of intoxication, and that such intoxication has been in part produced by, etc., or that she has suffered mental anguish and shame on account of his drunkenness, and that this has been caused in whole or part by, etc., then these facts may be taken into account, in determining whether or not, you should give exemplary damages.[62]

§ 780. No Allowance for Mortification or Mental Suffering of Plaintiff or Surviving Relatives. That in estimating the actual damages which the plaintiff has sustained, the jury should not take into consideration any mortification to her feelings, or mental suffering on her part; in estimating the actual damage, the jury can only consider the pecuniary loss, if any, which she has sustained, as shown by the evidence, but no allowance can be made for the grief or bereavement of surviving relatives.[63]

§ 781. Loss of Support—Damages from Intoxication. (a) If you believe, from the evidence, that the husband of the plaintiff before his death was in such circumstances that the plaintiff, as his wife, required the proceeds, or a part of the proceeds, of his daily labor for her support, then she was entitled to this support out of his daily labor; and if you further believe, from the evidence, that while she was entitled to such support the defendant sold him intoxicating liquors from time to time which caused his intoxication (or contributed to such intoxication) and that the plaintiff was thereby deprived of her means of support in whole or in part, then the defendant would be liable to respond in damages to the amount of the support he so deprived her of.

(b) Every man who has a wife owes her maintenance and support, and if his only means of affording such support is out of his daily labor, then, if a person sell him intoxicating drinks so as to produce intoxication and thereby renders him unfit for labor and

61—Bates v. Davis, 76 Ill. 222; Meidel v. Anthis, 71 Ill. 241.

62—Friend v. Dunks, 37 Mich. 25; See Brownford v. Swineford, 44 Wis. 282; Boyer v. Barr, 8 Neb. 68.

63—Brantigan v. White, 73 Ill. 561; Kans. P. Rd. Co. v. Cutler, 19 Kans. 83; Huntingden Rd. Co. v. Decker, 84 Penn. St. 419; March v. Walker, 48 Texas 372.

prevents him from pursuing his only means for the support of his wife, such person is liable to the wife for the loss thus sustained by her.[64]

(c) If you find for the plaintiff, she will be entitled to recover such reasonable sum of money, not to exceed $——, as in your judgment will compensate her for the actual damage, if any, to her means of support, caused by sales of intoxicating liquor by defendant, his agents or servants, to the plaintiff's husband.[65]

LIVE STOCK— INJURIES TO.

§ 782. Cattle Damaged or Injured in Transportaion—Overloading. (a) The law is that a common carrier like the defendant must pay the market value at the point of destination of all property entrusted to it for transportation which through its fault is lost or destroyed and is not delivered. The law also is, that if a carrier receives property for transportation and delivers it at the end of its route, but, through its fault, it is damaged and it fails to deliver it in the same condition as when received, it must pay the difference between the value of the property in its damaged condition at the point of destination and what the value of the property would have been at that place if delivered in the same condition as when it was received for transportation. These are the general rules of law which must be applied in the assessment of the damages in the two cases now on trial.[66]

(b) Should you find for plaintiff under the instructions herein given, you are instructed that the measure of damages for the loss of cattle dying, if any, from injuries received in transportation, through the negligence, if any, of defendant, is the market value of the cattle at the time and place of destination; as to those injured, if any, the difference between the market value, if any, of the cattle at the time and place of destination in the condition in which they would have arrived if properly handled and transported, and their market value at the time and place of destination in the condition in which they did arrive there.

(c) The defendant, the ————, would only be liable for damages and injury, if any, done to said cattle by reason of the negligence, if any, of said company while said cattle were in the possession of said company and on its own line of road. The court instructs you that if you believe from the evidence that the plaintiff negligently overloaded the cattle in the cars for transportation to T, and that his negligence in that particular, if any, contributed to the damage suffered by his said cattle, if any, then you will return your

64—Schneider v. Hosier, 11 Ohio St. 98.

65—Garrigan v. Kennedy, — S. D —, 101 N. W. 1081 (1085).

66—New York, etc. R. R. Co. v. Estill, 147 U. S. 591 (598), 13 S. Ct. 444.

verdict for defendants, even though you may believe from the evidence that the defendants were negligent in handling plaintiff's cattle.[67]

§ 783. Same Subject—Difference in Value in Their Injured Condition and the Condition They Would Have Been in If Not Injured —Enumerated Questions of Fact. (a) If you believe from the evidence that the cattle in question were by the negligence of defendant, injured during transportation, then you are instructed that the measure of damages would be the difference in the market value of such cattle at the place of destination at the time they arrived there, in their injured condition, if injured, and their market value at such place of destination in the condition they would have been in when they should have arrived there, but for such injuries.[68]

(b) In the light of testimony, both for the plaintiffs and defendant, to which I have alluded, and in the light of any other testimony in the case which you may recall, and bearing in mind that the burden of proof is on the plaintiffs to show that the cattle in question received injuries and the extent and result of such injuries, you will have to determine the following important questions of fact, namely, 1st: How many cattle in each herd were injured in any manner, in consequence of the collision, to such extent as to lessen their market value at the point of destination? 2d. How many of L. Bros.' cattle were killed or badly injured and left at Nankin, in consequence of the collision, and what would have been the value of such cattle in S. county at the time they should have arrived, if they had been delivered in the condition in which the defendant received them? 3d. How many of L. Bros.' cattle (if any) died of injuries received by the collision after they had been delivered to L. Bros., and what was the reasonable market value in S. county of those cattle if they had arrived uninjured? 4th. How many animals in each herd lost their calves as the direct result of the collision, and to what extent did such loss of their calves lessen their market value at the point of destination? 5th. What number of cattle in each herd, besides those that are said to have died or lost calves, were otherwise injured by the collision, by strains, bruises, etc., so as to materially lessen their market value, and what was the amount of such depreciation in value? To arrive at a just and intelligent verdict in these cases you will have to determine from the testimony each of the foregoing questions.[69]

§ 784. Cows or Heifers Being With Calf at the Time of Collision—Aborted Their Calves in Consequence. (a) If the jury are satisfied by a preponderance of the evidence that the cows or heifers men-

67—Missouri K. & T. Ry. Co. v Chittim, 24 Tex. Civ. App. 599, 60 S. W. 284 (285).

68—Gulf. C. & S. F. Ry. Co. v. Millar, 24 Tex. Civ. App. 430, 59 S. W. 550 (551).

69—N. Y. L. E. & W. R. R. Co. v. Estill, 147 U. S. 591 (602), 13 S. Ct. 444.

tioned in the petition were with calf at the time of the collision alleged in the petition, and that some of them aborted their calves in consequence of injuries received in said collision, and that ordinary care and prudence required that such aborting cow or cows should be separated from the other pregnant cows of plaintiffs, and that this was not done, but such aborted cow or cows was or were allowed to be and remain with the other pregnant cows, by reason of which such other pregnant cow or cows, or some of them, aborted their calves by contagion or sympathy, they should not allow damages for or on account of abortions thus caused by contagion or sympathy.

(b) I will also say that the defendant cannot be held liable for losses occasioned by premature birth of calves, or by the death of stock, if such births or deaths were the result of over feeding or the result of change of climate or fatigue or heat or of a long voyage on the ocean or by rail, or of all such cases combined. In other words, gentlemen, the defendant is only liable for such premature births and deaths as are shown by the testimony to have been directly occasioned by injuries sustained in the collision. The question as to what causes led some of the animals in the two herds to lose their calves or to die after arrival is a question which you may find some difficulty in solving, as in the nature of things these are questions that do not admit of solution by positive or direct proof. I will only say that you must apply your best judgment and your experience to the solution of these questions, giving to all the testimony, including that of the experts, such weight as you think it fairly deserves. If, upon a fair consideration of the subject, you deem the evidence insufficient to establish what was the cause of the abortions, then it will be your duty to disallow the plaintiff's claims for damages on that account. If the evidence establishes to your satisfaction that some of the abortions were the direct result of the collision, but leaves you undecided as to the cause of other abortions, then you should allow damages for such as you are satisfied were the result of the collision and disallow the plaintiffs' claims as to the residue.

(c) The jury are further instructed that before they can allow the plaintiffs damages on account of abortions, as claimed in the petition, they must be satisfied by a preponderance of the evidence that the abortions, if any, were caused directly by the alleged collision.

(d) If L. Bros. have satisfied you by the evidence that any cows or heifers that were with calf when the collision occurred, as the direct result of that collision, lost their calves, and that such premature casting of their calves made the animals less valuable in the market than they would have been but for such loss, then they are entitled to recover the amount of the depreciation in value of any of the animals that so lost their calves.

(e) The court instructs the jury that unless the defendant knew

that some of the cattle of the plaintiffs were cows or heifers in calf plaintiffs are not entitled to recover for abortions, though they may have been caused by the wreck, as in that event damages on account of abortion could not have been in the contemplation of the defendant at the time the cattle were received.

(f) If the jury find that the plaintiffs' cows aborted their calves after the alleged collision, and that some of said abortions were caused by said collision, and that some were the result of poison, fatigue, heat, exhaustion, or any cause other than the collision, and the jury are unable to determine from the evidence which cows and how many aborted in consequence of the collision and which from other causes, they should not allow damages on account of abortion from any cause.

(g) The court instructs the jury that the burden is not upon the defendants to account for the abortions amongst cows and heifers of plaintiffs, if there were such abortions, but upon the plaintiffs to prove and establish by a preponderance of the evidence that such abortions were caused by the collision alleged in the petition, and if upon all the evidence the jury are not convinced that such abortions were caused by the injury, they should not allow damages for such abortions, although they may not be able to determine from the evidence what the real cause of such abortion was.[70]

§ 785. Injuries to Horses While Being Transported—Rule of Damages. The court instructs the jury that if you find for the plaintiff in this case, that in estimating the plaintiff's damages you have a right to take into consideration the difference in the fair market value of the horses in question, and each of them, at the time of the shipping of said horses from Geneva, Ill., to Fort Wayne, Ind., and their fair market value after the injury complained of, as shown by the evidence in this case, and also whatever sum or sums of money the evidence shows the plaintiff paid out in endeavoring to cure said horses or either of them from the injuries complained of, and all the loss sustained by the plaintiff by reason of such injury, if any such loss is shown by the evidence in this case, not exceeding the value of said horses, and not exceeding the amount claimed in the plaintiff's declaration.[71]

MALICIOUS PROSECUTION—FALSE IMPRISONMENT.

§ 786. Malicious Prosecution—What to Consider in Assessing Damages. (a) The jury are instructed, that if, from the evidence and instruction of the court you find the defendant guilty, then in assessing the amount of the plaintiff's damages you have a right to

70—The seven instructions above were approved in N. Y. L. E. & W. R. R. Co. v. Estill, 147 U. S. 591 (604), 13 S. Ct. 444.

71—C. & N.-W. Ry. Co. v. Calumet Stock Farm, 194 Ill. 9 (14), aff'g 96 Ill. App. 337, 61 N. E. 1095, 88 Am. St. 68.

take into account the peril to which defendant was subjected of losing his liberty, and also the injury to his reputation and feelings, if you find from the evidence that he was injured in his reputation and feelings by the charge made against him.[72]

(b) If you find for the plaintiff, you will award him such damages as will fairly compensate him for any injuries or indignity he may have sustained. In awarding such damages, you may consider the character of his injuries; what physical injury, if any, he sustained; and also the mental suffering, if any; also any sense of shame or humiliation suffered on account of such wrongful acts, if any, that were committed against him; and award him such damages as will be a fair compensation in the premises.[73]

§ 787. Same Subject—Exemplary Damages. (a) The jury are instructed, that in actions of this kind, if the jury find the defendant guilty under the evidence and instructions of the court, and that the plaintiff has sustained any injury or damage by reason of the charge brought against him, then, in assessing the plaintiff's damages, the jury are not limited to mere compensation for the actual damage sustained by him; they may give him such a further sum by way of exemplary or vindictive damages as the jury may think right in view of all the circumstances proved on the trial, as a protection to the plaintiff and as a salutary example to others to deter them from offending in like manner. And in determining the amount of exemplary damages which would be proper to give, the jury may take into consideration the pecuniary circumstances of the defendant so far as they have been proved.[74]

(b) If you find that the defendant, without probable cause, and maliciously, caused the arrest of the plaintiff, you are authorized to go further, and award punitory damages in such sum as will be a warning to defendant and all other persons not to commit similar wrongs, and consequently such damages, to be effectual, must have some relation to the financial ability of the defendant. It is on this theory that evidence as to defendant's financial ability has been admitted.[75]

§ 788. Injuries to Feelings, Credit and Reputation. The court instructs you that if you find for the plaintiff, the measure of actual

72—Lavender v. Hudgens, 32 Ark. 763.

73—Golibart v. Sullivan, 30 Ind. App. 428, 66 N. E. 188 (191).

"The objection made to this instruction is that it assumes that appellee suffered, when it is not shown by the evidence that he suffered; also that it told the jury that they might consider his sense of shame or humiliation without confining it to the acts of ———. The award of damages is limited to any injury he may have sustained. This is a conditional statement. It is not an assumption. The jury as persons of average intelligence must have understood that the court limited their consideration to the acts of the appellants, or either of them, and to which the evidence related."

74—Winn v. Peckham, 42 Wis. 493.

75—Eggert v. Allen, 119 Wis. 625, 96 N. W. 803 (805-6).

damages will be such a sum, not to exceed the amount sued for as actual damages, as you may find from the evidence to be a just and reasonable compensation to plaintiff for the injury, if any, sustained by him as the direct and proximate result of said criminal prosecution, taking into consideration the loss of time and the reasonable expense, if any, necessarily incurred by plaintiff in the defense of said prosecution, and the injury, if any, to plaintiff's feelings, credit or reputation.[76]

§ 789. Malicious Prosecution for Arrest of Passenger—What Must Be Shown by Plaintiff—Shame, Mortification, Mental Anguish, Pain and Injury to Feelings May Be Considered in Determining Damages. The court instructs the jury that if they find and believe from a preponderance of the evidence, first, that the defendant, through its conductor on said car mentioned in the evidence, acting within the scope of his authority, as defined in these instructions, instituted and prosecuted the proceedings against the plaintiff set forth in the petition; second, that the prosecution alleged in said petition was finally determined in favor of the plaintiff; third, that, from all the facts and circumstances connected with the case, the defendant, at the time of instituting and carrying on the prosecution mentioned in the petition, had no reasonable or probable cause to believe plaintiff was guilty of the offense charged, as more fully explained in another instruction given you; fourth, that in said proceedings against the plaintiff the defendant was actuated by malice towards plaintiff—then their verdict will be for the plaintiff, and they will assess his actual damages in such sum as they believe from the evidence will fairly and reasonably compensate him for any shame, mortification, mental anguish, and pain and injury to his feelings which they may believe from the evidence was suffered by him, and directly resulted from defendant's alleged acts; and the jury is further at liberty, if they believe from the evidence that said alleged act or acts of the defendant were done wantonly, maliciously, and in gross disregard of plaintiff's rights as a passenger on said defendant's car, if they so find and believe him to be (and if they think just and proper in view of all the facts and circumstances in evidence), to award to plaintiff punitive or exemplary damages, in addition to actual damages, in such sum as they believe will, under all the circumstances of the case, punish defendant, and serve as a warning to others against a like course of action; and, if the jury find in favor of plaintiff as to punitive damages, they will so find, and the amount thereof, separately, and separately state in their verdict.[77]

76—Curlee v. Rose, 27 Tex. Civ. App. 259, 65 S. W. 197 (198).

"The word 'credit,' in the sense in which it was used, evidently was intended by the court to mean as relating to his standing as a citizen in the community in which he lived; in other words, as an expression synonymous with the word 'reputation.'"

77—Dwyer v. St. Louis Transit Co., 108 Mo. App. 152, 83 S. W. 307 (305).

In approving the above instruc-

§ 790. Actual and Punitive Damages—Sound Discretion of Jury. The action is one for damages and if the jury decide to find for the plaintiff (in other words if he has been a victim of malicious prosecution) then they are not limited in estimating the damages, to the actual damages proved or sustained, but they are at liberty in their sound discretion, if the facts proved justify it, to award exemplary or punitive damages, not to enrich the plaintiff, but to a certain extent, to punish the defendant.[77a]

§ 791. Trespass or False Imprisonment—What to Consider in Assessing Damages. If, under the evidence and instructions of the court you find the defendant guilty, and if you believe from the evidence that the defendant was guilty of willful, gross and wanton oppression of the plaintiff, then, in assessing the plaintiff's damages, you are not limited to the amount of his actual pecuniary loss, but you may also take into consideration his physical pain or bodily suffering if any is shown, also his mental suffering, such as anguish of mind, sense of shame, humiliation, or loss of honor, reputation or loss of social position, if you find that these things have resulted from the acts complained of, and allow the plaintiff such compensation therefor as you think will make good the injury sustained.[78]

NUISANCES.

§ 792. Erection of Boiler Near House of Another—Less Comfortable, Enjoyable or Useful. If the jury find, from the evidence, that defendant erected a boiler and engine near to the house and lot of the plaintiff, and that smoke, steam and cinders escaped from the chimneys of the defendant, connected with the said boiler, which smoke, steam, and cinders entered the premises of the plaintiff in

tion the court said: "The only reference the instruction makes to the petition is to the criminal prosecution had in the police court, about which evidence had been given. It was no more objectionable than would have been a reference in an instruction to a horse described in a petition, the ownership of which was in issue. It is true that an artificial person (a corporation) cannot entertain malice; neither can it think or act. It can act through its agents and servants, and does so act. It can also think by its officers, agents, and servants, and does so think, and it can harbor malice and seek revenge through these same officers, agents, and servants; and when they act maliciously in the service of the corporation, and within the scope of the authority delegated to them, the law ascribes their malice to the corporation, and holds it to the same civil liability as if the malicious act had been done by a natural person. Ruth v. St. Louis Transit Co., 98 Mo. App. 1, 71 S. W. 1055; Woodward v. Railway, 85 Mo. 142, 42 Am. Rep. 413; Boogher v. Life Ass'n, 75 Mo. 319; Babcock v. Merchants' Exchange, 159 Mo. 381, 60 S. W. 732. In respect to the measure of damages, the instruction does not authorize a recovery for physical pain, as contended by the defendant, but for mental anguish, pain, and injury to the feelings—synonymous terms in this connection. That damages are recoverable for mental anguish, pain, and suffering of mind, in this character of actions, is the law. Ruth v. Transit Co., supra."

77a—Baker v. Hornick, 57 S. C. 213, 35 S. E. 524 (527).

78—Stewart et al. v. Maddox, 63 Ind. 52; Scripps v. Riley, 38 Mich. 10; Fenelon v. Butts, 53 Wis. 344, 10 N. W. 501.

such quantity or to such extent as to render her house and premises less comfortable, enjoyable, or useful than they otherwise would have been, then the plaintiff is entitled to a verdict.[79]

§ 793. Defendant's Works Reducing Selling Value of Plaintiff's Property. (a) The jury are instructed that under the declaration in this case the plaintiff's claim of damages is made on the ground that the operation of defendant's works has depreciated the selling value of the property.

(b) If the jury believe from the evidence that since the operation of defendant's works the selling value of the plaintiff's property is higher than before, and that the operation of defendant's works has caused the greater portion of such increase of value in the plaintiff's property by reason of its nearness to the works, and that such increase in selling value caused by the defendant's works exceeds any damages ever done to the plaintiff's property or their enjoyment of it by defendant's works, then the verdict must be for the defendant.[80]

§ 794. Smoke, Noise, Smells, etc., from Defendant's Works—Rise in Selling Value of Plaintiff's Property. The jury are instructed that even if they believe from the evidence that the operation of defendant's works has caused smoke, noise, smells and jarring, and that such smoke, noise, vapor, smells and jarring caused to plaintiffs in the enjoyment of their property, something besides a mere imaginary and whimsical injury, yet the jury are further instructed that under the plaintiff's declaration they cannot recover in this case, if the jury find from the evidence that the selling value of the plaintiff's property has been increased by the operation of defendant's works, independent of a rise in similar property to an amount in excess of any damage ever done by the operation of said works to plaintiffs or their property.[81]

PERSONAL PROPERTY GENERALLY—INJURIES TO.

§ 795. Must Make Reasonable Efforts to Stop or Reduce Damages to Business or Property, to Recover for Loss. The jury are instructed that a person can in no case recover for damages to his business or

79—Euler v. Sullivan, 75 Md. 616, 23 Atl. 845, 32 Am. St. Rep. 420.

"Does the instruction given by the court on the part of the plaintiff correctly define the law, as applicable to this case? In the recent case of Susquehana Fertilizer Co. v. Malone, 73 Md. 276, 20 Atl. Rep. 900, this court said that no principle is better settled than that 'where a trade or business is carried on in such a manner as to interfere with the reasonable and comfortable enjoyment by another of his property, or which occasions material injury to the property itself, a wrong is done to the neighboring owner for which an action will lie.' Vide cases there cited. But all of the authorities hold that the injury must be of a character to diminish materially the value of the property, or seriously interfere with the ordinary comfort and enjoyment of it, such as would entitle the party injured to substantial damages. Adams v. Michael, 38 Md. 123, 17 Am. Rep. 516."

80—Chi. Forge & Bolt Co. v. Sanche et al., 35 Ill. App. 174 (177).

81—Chi. Forge & Bolt Co. v. Hedges, 35 Ill. App. 174 (178).

property which he permits to go on, knowing that it is going on, and without making every reasonable effort and taking active steps to prevent it, or have it stopped. If you believe, from the evidence, that plaintiffs knew that their premises were being damaged, and that they permitted the damage to continue, when, by their own efforts, the damage might have been stopped or prevented, then the defendants are not liable for damage so caused, and plaintiffs cannot recover in this suit for any such damage.[82]

INJURY TO PERSONAL PROPERTY.

§ 796. Measure of Damages for Failure to Use Ordinary Diligence, etc., in Drying, Curing, Packing and Handling Fruit. In the event the jury find that the defendant did not use ordinary diligence, skill or care in drying, curing, packing and handling said fruit, the damage to plaintiff is the difference between the market value of such fruit at the time of the sale, had ordinary diligence, skill and care been used by defendant in drying, curing, packing and handling the same, and the sum for which the same was sold.[83]

§ 797. Market Value of Destroyed Property—Cost of Conveying Same to Replace Loss. (a) The court instructs you that, if you believe, from the evidence, that the plaintiffs raised the straw burnt, for the purpose of feeding the same on the farm, and if you further believe, from the evidence, that there was no market for the sale of straw at the time and place it was destroyed, then the measure of damages for the burning of such straw is the market value of straw of the same kind where it could have been bought, plus the cost of conveying it from the place where purchased to the place where it was burnt.[84]

82—Hartford Dep. Co. v. Calkins, 85 Ill. App. 627 (630).

"The law required that appellees should make reasonable efforts at least to protect themselves from unnecessary injury, and they cannot recover damages occasioned by their own neglect. In Hamilton v. McPherson, 28 N. Y. 72-76, 84 Am. Dec. 330, it is said by Judge Selden: 'The law for wise reasons imposes upon a party subjected to injury from a breach of contract the active duty of making reasonable exertions to render the injury as light as possible. Public interest and sound morality accord with the law in demanding this; and if the injured party, through negligence or wilfulness, allows the damages to be unnecessarily enhanced, the increased loss justly falls upon him.' It is said in Hogle v. N. Y. C. & H. R. R. R. Co., 28 Hun 363: 'If it were in the plaintiff's power by reasonable efforts to prevent the increase of the wrong, he should use that power.' To the same effect are the cases Miller v. Mariners' Church, 7 Me. 51 (55), 20 Am. Dec. 341; Mather v. Butler Co., 28 Ia. 253-59; Sherman Center Town Co. v. Leonard, 46 Kans. 354-358, 26 Pac. 717, 26 Am. St. Rep. 101." Approved 186 Ill. 104, 57 N. E. 863, case reversed on another point.

83—Arnold v. Producers' Fruit Co., 141 Cal. 738, 75 Pac. 326 (328).

84—Chi. G. Ry. Co. v. Gitchell, 95 Ill. App. 1 (3).

"The appellant's refused instruction told the jury that the measure of damages was the actual fair cash market value of the straw at the nearest market less the cost of delivering the same thereat. The above instruction raised directly the question as to whether in de-

(b) The court instructs you that in estimating such damages, you will consider the value of the grass so destroyed for the purpose of its use by the plaintiff at the time of its burning.[85]

§ 798. **Escape of Gas—Injury to Flowers.** Of course, gentlemen, it is not claimed here, as I understand, on the part of defendants, but that if their gas mains were in a defective condition, and as a matter of fact gas did escape from the gas mains and penetrate into the plaintiff's greenhouses, and did cause injury to these plants, but what the plaintiff would have a right to recover for such injury; but it plants itself squarely upon the claim that no such thing occurred.[86]

§ 799. **Damages—Natural Gas Explosion in House—Statement of Agent—Negligence.** The complaint avers among other things, that the defendant, by its agent, announced to or in the hearing of the plaintiff that he would turn off the gas at the company's valve in the street, and that the plaintiff did not know that it was turned off at the house valve, and not in the street. You are instructed that this is a material averment of the complaint, and, unless it has been proven by a preponderance of the evidence, no recovery can be had.[87]

§ 800 **Goods Lost by Common Carrier—Market Value When and Where to be Delivered.** The jury are instructed, that the measure of damages, in case of a failure of a common carrier to deliver goods according to contract, and which are lost, is their market or actual value at the time when, and the place where, they should have been delivered; and such value is purely a question of fact to be fixed by the jury, from the evidence in the case.[88]

§ 801. **Damages for Proximate Consequence of Act—No Recovery for Damages that Could Have Been Avoided by Plaintiff by Reasonable Care.** The jury are instructed that plaintiffs are only entitled to recover in this case such damages as they have shown by the preponderance of the evidence were the natural and proximate consequence of the acts complained of in the petition, and that they are

termining the measure of damages in a case where there is no market value for the property in question at the place where it was destroyed, the cost of conveying the property to or from the nearest market must be added or deducted. We are of the opinion that this question depends largely upon the circumstances of the case. . . . The straw was destroyed by appellant, and it should indemnify appellees for their loss. The only way in which they can be indemnified is by awarding them an amount sufficient to purchase other straw of like quality delivered on their place. The rule of law as to the measure of damages in such a case is that it is the market value at the nearest market, plus the cost of getting the property from the market to the place where the other property was destroyed. 1 Sedg. Dam. (8th ed.) sec. 246; Sutherland on Damages (3d ed.), secs. 1096 and 1098; Capen v. DeSteiger Glass Co., 105 Ill. 185."

85—San Antonio & A. P. Ry. Co. v. Stone, — Tex. Civ. App. —, 60 S. W. 461.

86—Hansen v. St. Paul Gaslight Co., 88 Minn. 86, 92 N. W. 510 (511).

87—Huntington L. & F. Co. v. Beaver, 37 Ind. App. 4, 73 N. E. 1005.

88—C. & N. W. Ry. Co. v. Dickinson, 74 Ill. 249.

not entitled to recover any damages which could have been avoided or prevented by the plaintiffs by the exercise on their part of reasonable and proper care and prudence.[89]

REAL ESTATE GENERALLY—INJURIES TO.

§ 802. Damage by Fire—Value of Land Before and After the Fire—Damage to Growing Timber. (a) The measure of damages is the diminution of the market value of the land, occasioned by the fire; that is to say, the difference between the value of the land immediately before and after the fire.[90]

(b) The court instructs you that the measure of damages, if plaintiff is entitled to any damages at all, is the difference between the value of the land before and after the fire complained of; and in this case you will so allow the damages, if you believe the plaintiff is entitled to any damages.

The court further instructs you that you must consider the actual damage to the plaintiff, if any, as explained in the instructions in this case, and you have no right to allow or to consider mere conjectural or speculative damages not proved by the evidence.[91]

(c) The measure of damages is the difference between the value of the timber standing and growing upon the land in question immediately before the fire in question and the value of such timber immediately after such fire.[92]

§ 803. Putting up Telephone Wires—Injury to Trees. The jury are instructed that, if you find and believe from the evidence that on or about the ———— day of ————, the plaintiff was the owner of (describing the lot), and that there was a tree along the sidewalk and in front of said property, and belonging to the plaintiff, and that the defendant unlawfully cut off the top of said tree and caused the death of said tree, then your verdict should be for the plaintiff[93]

89—N. Y. L. E. & W. R. R. Co. v. Estill, 147 U. S. 591 (599), 13 S. Ct. 444.

90—Pennsylvania Co. v. Hunsley, 23 Ind. App. 37, 54 N. E. 1071 (1076).

91—C. & A. R. R. Co. v. Davis, 74 Ill. App. 595 (598).

92—Burdick v. C., M. & St. P. Ry. Co., 87 Iowa 384, 54 N. W. 439 (440). "In the case of Greenfield v. C. & N. W. Ry. Co., 83 Ia. 270, 49 N. W. 95, this court approved an instruction to the jury which was in these words: 'If you find that the fire ran to the timber of the plaintiff, and burned and injured it, then award him on account thereof that sum which represents the difference in the value of the timber just before and its value just after the fire.' It will be seen that the two instructions are identical in meaning, and we think, in view of the state of the record, the defendant is in no position to complain of the rulings of the court as to the measure of damages. The evidence is practically the same whichever rule be adopted, and there is no claim that the verdict is excessive."

93—Betz v. K. C. H. Telephone Co., 121 Mo. App. 473, 97 S. W. 207. "Ordinarily the term 'unlawfully' in the sense in which it was used should have been defined, so that the jury might be able to determine whether the act complained of would entitle the plaintiff to recover. But it could make no difference under the facts in evidence. It was shown that the

§ 804. **Market Value of Acreage for Purposes of Subdivision.** If the jury believe from the evidence that there was a demand for acreage property in and about the city of W. on ————, for purposes of subdivision and sale in lots, and that the land in controversy was at that time supposed to be adapted to subdivision and sale in lots, and in consequence of its supposed adaptability to such subdivision and sale in lots had a market value above the price which the plaintiff agreed to pay for it, the jury must take into consideration such increased value above such contract price, whether such demand for acreage property, if any, was permanent or temporary, and whether, if the land in controversy had been subdivided, there would have been at that time any demand for the lots thereof or not.[94]

§ 805. **Injuries to Dock by Vessel.** If you believe this man did not slide down the line, but that the man who took the line upon the dock was the watchman of the plaintiff company, in the discharge of his duty as such watchman, and that it was part of his duty to aid these boats in landing—to do what he could to contribute to their landing, in the interest of his employer—then he would be, in that act, the agent of the plaintiff; and, if he was guilty of contributory negligence, the plaintiff can not recover. It is claimed by the plaintiff in regard to this matter that that was not a part of that man's duty, that he was not employed for that purpose, and that it was no part of his business to interfere with the landing of these boats, or that, if he was asked to do it, being asked to do it made him the agent of the defendant. I charge you that such is the law; that if this was no part of his duty, and he was asked to do it by the defendant, and did it at its request, and acting for it, in that respect he was the agent of the defendant, the boat company, and his negligence could not be determined or decided by you as contributing to the result as being the agent of the plaintiff. But, as I said to

poles and wire were put up without disturbing the tree in any manner, and that it was not cut until at least a month or two afterwards. There was not a particle of evidence tending to show that there was any necessity for the act. In fact, it was denied that the defendant cut it, yet the verdict of the jury was that it did, which is conclusive on that question. Neither the city, nor the defendant, which derived its authority to establish the telephone line, had any right to cut plaintiff's tree, unless there existed a necessity for the act. All the authorities agree as to that. Lewis, Eminent Domain, 132a. In the absence of evidence that there was any necessity for cutting plaintiff's shade tree, the presumption is that the act was unlawful. The word 'unlawfully,' under the circumstances, may be treated as surplusage. The only issue before the jury, therefore, was, did the defendant cut plaintiff's tree? The petition not only charges that defendant unlawfully cut the tree, but that the act was done in such a careless manner as to cause its death. The latter allegation is immaterial and superfluous, if the act of cutting the tree was unlawful. If the act had been lawful, then the manner in which it was done would be material. In the latter instance the right to recover would be predicated upon the negligent manner of doing a lawful act."

94—Dady v. Condit, 209 Ill. 488 (498), 70 N. E. 1088.

you before, if he was acting in that capacity, and he did this as a matter of his duty or employment on the part of the plaintiff, then a mere request to ask him to take the line would not make him the agent of the boat company, the defendant in this case.[95]

§ 806. **Estimating Value of a Reversionary Interest.** If the jury find any damages for plaintiff on account of the land referred to, they cannot find exceeding the value of the reversionary interest therein after the death of Mrs. B., and the death or attaining —— years of age of her children; and in estimating the value of said reversion they will consider the present prospect of life of said life tenants, and the value of this interest, and deduct from the total value of the land, and the remainder will represent the value of the reversion.[96]

SHERIFFS.

§ 807. **Recovery of Damages for Taking of Property by Sheriff.** It is admitted by the said defendant and A. W. C. that the property in question was, on the ———— day of ————, by his deputy, taken from the possession of the plaintiff; and it is also admitted that said defendant has ever since deprived the plaintiff of the possession of the same; and if the jury believe from the evidence that the property in question did, at the time this action was commenced, belong to the plaintiff, then the measure of damages for plaintiff to recover will be the value of the property at the time of the taking, as shown by the evidence, with interest thereon, at the rate of —— per cent. per annum from the ———— day of ———— up to the first day of this term of court.[97]

§ 808. **Damages for Wrongful Seizure of Mortgaged Goods—Interest.** If you find for the plaintiff, the amount which he will be entitled to recover will be the amount of the fair, reasonable market value of the property at the time it was levied upon and taken, together with six per cent. per annum interest thereon from the date of the levy up to this time; not, however, exceeding in amount the sum total of the several claims secured by the mortgage, with interest thereon at the rate of six per cent. per annum from the ———— day of ————.[98]

95—Blades v. Board of Water Com'rs, 122 Mich. 366, 81 N. W. 269 (271).

"We think there was no error in the charge as given. It appears that none of the plaintiff's employes were on the dock at that time, except a ——; and the evidence is undisputed that it was part of the duty of —— to take the line, and in fact it was shown that he was not on duty for plaintiff at that time, and was there only as a spectator. The court might well, under the disputed evidence, have instructed the jury that the person who took the line was for that purpose the agent of the defendant. The captain testified that, when the line was thrown out, he called to this man to take it and place it over the pile."

96—Bryant v. Everly, 22 Ky. L. Rep. 345, 57 S. W. 231 (232).

97—Campbell v. Holland, 22 Neb. 587, 35 N. W. 871 (879).

98—Crawford v. Nolan, 72 Iowa 673, 34 N. W. 754 (756).

§ 809. **Suit on Replevin Bond.** (a) The jury are instructed, that although this action is in form an action of debt, for the sum of $——, the penalty in the bond, the action is, in fact, an action to recover for the damages alleged to have been sustained by the plaintiff, by reason of the property mentioned in said bond not having been returned to the defendant in the replevin suit, according to the condition of the bond.

(b) And if the jury find the issues for the plaintiff, they should, by their verdict, find both the debt and the amount of the damages; the debt will be $——, the penalty mentioned in the bond, while the damages will be such an amount as the evidence shows the parties, for whose use this suit is brought, have sustained by reason of the non-return of said property, according to the condition of said bond.

(c) The jury are instructed, that if they find, from the evidence, under the instructions of the court, that the plaintiff is entitled to a verdict, and that the parties for whose use the suit is brought have sustained damage, as alleged, then it will be the duty of the jury to assess the amount of such damages; and if the jury further believe, from the evidence, that the said T. M. B. was sheriff of this county at the time the said property was taken, and that the said sheriff was then holding the said property, under, and by virtue of, a writ of attachment in favor of the other defendants in the replevin suit, for an indebtedness claimed to be due to them by one J. F., and that a judgment was afterwards rendered in said attachment suit for the sum of (four thousand) dollars, in favor of the plaintiffs in that suit, then the measure of damages in this case is the said sum of (four thousand) dollars, and interest thereon, at the rate of six per cent. per annum, since the date of said judgment, and the further sum of (twenty) dollars, defendant's costs in the said replevin suit; provided, however, that if the jury believe, from the evidence, that the value of the property taken by the said J. E., in the replevin suit, was worth less than the amount of said judgment, interest and costs, then the measure of damages, in this suit, will be the value of such property, as shown by the evidence, and no more.[99]

SLANDER AND LIBEL.

§ 810. **Plea of Justification must be Filed in Good Faith.** If the jury believe, from the evidence, and from the facts and circumstances proved on the trial, that when the defendant filed his plea of justification, he had no reasonable hope or expectation of proving the truth of it, then, if the jury believe, from the evidence, that the defendant is guilty of the slander charged in the declaration, they may, in fixing the amount of the plaintiff's damages, regard the filing of the plea as an aggravation of the original slander.[100]

99—2 Sutherland Dam. (3d ed.), sec. 499; Sedg. Dam., 585; Jennings v. Johnson, 17 Ohio 154; Noble v. Epperly, 6 Ind. 468; Hayden v. Anderson, 17 Ia. 158.

100—Harbison v. Schook, 41 Ill. 141; Swails v. Butcher, 2 Ind. 84.

§ 811. **Plaintiff's Bad Reputation may be Shown.** If the jury believe, from the evidence, that the plaintiff's general reputation for chastity, at and before the alleged speaking of the words in question, was bad, then the jury have the right to take this fact into account in assessing the plaintiff's damages, in case you find the defendant guilty.[1]

§ 812. **Mental Suffering Produced by the Slanderous Words—Injury to Reputation or Character—Damages Presumed, When.** (a) If, from the evidence, under the instruction of the court, you find the defendant guilty, then, in fixing the amount of the plaintiff's damages, you may take into consideration the mental suffering produced by the utterance of the slanderous words, if you believe, from the evidence, that such suffering has been endured by the plaintiff; and the present and probable future injury, if any, to plaintiff's character, which the uttering of the words was calculated to inflict.[2]

(b) In an action for slander, the law implies damages from the speaking of actionable words. And also that the defendant intended the injury the slander is calculated to effect. And in this case, if the jury believe, from the evidence, and under the instructions of the court, that the defendant is guilty, as charged, in the declaration, then they are to determine, from all the facts and circumstances proved, what damages ought to be given; and the jury are not confined to the mere pecuniary loss or injury sustained. Mental suffering, injury to reputation or character, if proved, are proper elements of damage.[3]

§ 813. **Drunkenness in Mitigation.** The court instructs the jury, that if you find, from the evidence, that the defendant is guilty of speaking the slanderous words, as charged in the declaration; that the defendant was, at the time, intoxicated with spirituous liquors to such an extent as to deprive him of the rational exercise of his mental faculties, this fact will be proper to be considered by the jury in determining whether the defendant was prompted in speaking the words of malice, in fact, and whether he ought to be charged with exemplary or punitive damages.[4]

§ 814. **Compensatory Damages Only, When Words Spoken without Malice though Showing a Want of Caution.** (a) Though the jury may believe, from the evidence, that defendant was guilty of speaking the slanderous words charged in the declaration, still, if the jury find, from the evidence, that the words were spoken without actual malice on the part of the defendant, though under circumstances show-

1—Duval v. Davey, 32 Ohio St. 604; Maxwell v. Kenedy, 50 Wis. 545, 7 N. W. 657.

2—Fry v. Bennett, 4 Duer 247; True v. Plumley, 36 Me. 466; Swift v. Dickermann, 31 Conn. 285; Hamilton v. Eno, 16 Hun (N. Y.) 599; Balt v. Budwig, 19 Neb. 739. 28 N. W. 282.

3—Baker v. Young, 44 Ill. 42.

4—Howell v. Howell, 10 Ired. (N. C.) 84; Gates v. Meredith, 7 Ind. 440.

ing a want of caution and a proper respect for the rights of the plaintiff, and that the plaintiff has suffered no special damage from the speaking of the words, then the jury should only give compensatory damages, and in such case compensatory damages are such as will pay the plaintiff for his expenses and trouble in carrying on the suit, and disproving the slanderous words.[5]

(b) You should allow such damages as under all the evidence would be a just compensation for the injury.[6]

§ 815. **Exemplary Damages May Be Given in Slander, When.** If the jury, under the evidence and the instructions of the court, find the defendant guilty in this case, in assessing the plaintiff's damages, they are not confined to such damages as will simply compensate the plaintiff for such injuries as the evidence shows she has received, by reason of the speaking and publishing of the defamatory words charged in the declaration, but they may, in addition thereto, assess against the defendant, by way of punishment to him and as an example to others, such damages as the jury, in their sound judgment, under all the evidence in the case, believe the defendant ought to pay, not exceeding, in any event, the amount of damages claimed by the plaintiff in the declaration; provided the jury believe, from the evidence, that the defamatory words were spoken maliciously or wantonly by the defendant.[7]

§ 816. **Vindictive Damages—Pecuniary Circumstances.** (a) If the jury find the defendant guilty, they should then determine, from all the facts and circumstances proved, what damages ought to be given to the plaintiff; and the jury are not confined to the mere pecuniary loss or injury, but they may give damages as a punishment to the defendant, as well as to compensate the plaintiff for the stain inflicted upon her character; provided the jury believe, from the evidence, that the defendant, in speaking the defamatory words, was actuated by malice in fact.

(b) If the jury believe, from the evidence, that the defendant is guilty of uttering the slanderous words charged in the declaration, then they may take into consideration the pecuniary circumstances of the defendant, and his position and influence in society, so far as those matters have been shown, by the evidence, in estimating the amount of damages which the plaintiff ought to recover.[8]

§ 817. **Pecuniary Circumstances—Reiteration.** The jury are instructed, that if they find the defendant guilty, then, in fixing the amount of plaintiff's damages they may take into consideration, in connection with all the other evidence in the case, the pecuniary circumstances and social standing of the defendant, and the character and standing of the plaintiff, so far as those have been shown

5—Armstrong v. Pierson, 8 Clarke (Ia.) 29.

6—Whiting v. Carpenter, 4 Neb. 342 (unof.), 93 N. W. 926 (928).

7—Templeton v. Graves, 59 Wis. 95, 17 N. W. 672.

8—Hosley v. Brooks, 20 Ill. 115.

by the evidence; and they may also take into consideration the fact, if proved, that the defendant has reiterated the slander on different occasions to different persons.[9]

§ 818. **Libel—What to Consider in Assessing Damages.** (a) If the jury believe, from the evidence, that the libel was published by the defendant, as charged in the declaration, then the plaintiff is entitled to recover. The amount of the recovery is to be determined by the jury, from a consideration of all the evidence and circumstances proved in the case; and in determining such amount, the jury will consider the character of the charge, the general reputation of the plaintiff at the time of the publication complained of, whether the defendants had an opportunity to retract the charge, whether it was maliciously made and persisted in, or whether made as public journalists and for laudable purposes and without malice, and all the facts proved in the case, having a reference to this subject.[10]

(b) The jury are instructed that, if you find from the evidence that the plaintiff's name was not mentioned in the article alleged to have been published in this case, you have a right to consider this fact in arriving at the amount of damages, in case you find for the plaintiff, and so far as any damages he might sustain by reason of said publication would only extend in circulation to such persons as were acquainted with him, both as E. F. and as marshall of R., and to such other persons as might afterwards become acquainted with him in both of these capacities.[11]

§ 819. **Same—Wealth of Defendant.** If the jury find the issues for the plaintiff, and believe, from the evidence, that the publication was made maliciously or wantonly, and under circumstances evincing a disregard of the rights of others, then, in making up their verdict, they may take into consideration the circumstances of the defendant as to wealth and possession of property, so far as these appear, from the evidence, and they may give a verdict for such sum as, from the evidence, they think the plaintiff ought to receive, and the defendant ought to pay, under all the circumstances of the case.[12]

§ 820. **Charge of Adultery—Measure of Damages.** If you find that this is a charge of adultery, or that the charge, as a whole, has a tendency to injure the standing and character of the plaintiff, and hold him up in disgrace, then you come to the question of damages. It is not a case, if you find that to be a charge of adultery, where the plaintiff has to prove special damages, to show that he has lost this or that patient, because the jury have a right to say, when a man

9—Harbison v. Schook, 41 Ill. 141; Humphries v. Parker, 52 Me. 502; Lewis v. Chapman, 19 Barb. (N. Y.) 252.

10—Sheahan et al. v. Collins, 20 Ill. 325.

11—Williams et al. v. Fuller, 68 Neb. 354, 94 N. W. 118 (119).

12—3 Sutherland. Dam. 3661; Hill on Rem. for Torts, 456; Hunt v. Bennett, 19 N. Y. 173; Knight v. Foster, 39 N. H. 576; Humphries v. Parker, 52 Me. 502.

is charged with a crime, that that does him an injury, and to say how much his damage shall be, without special proof of damages. He is entitled to damages for anything he suffered by way of personal feeling—grieving—on account of such a charge being published. And you have a right to consider what a citizen of good standing—how he would feel to have an article of that kind published about him, accusing him of having succumbed to the pretty charms of the caterer's wife, under the circumstances stated. You have a right to consider what would be the injury to any honorable man's feelings by having such a charge as that published in the Journal, in the way this was published and circulated among his friends and neighbors. And he is entitled to damages on that account, because it is what a man suffers in consequence of a libel, and that is one of the elements. He has told you himself in some degree how it affected him, and how it affected the business that he was engaged in, and it was a source for a long time of jest, but of more serious matter than jest, among his friends. That may be taken into consideration in determining what the damages are. In other words, being just to the Journal, and being just to ———, you are to say what is a reasonable compensation in dollars and cents for having such an article as that published under the circumstances that this was published; and all the natural results coming from that article in the way of damages, he is entitled to recover. You cannot give more than the *ad damnum* in the writ, ———— dollars; and you cannot give less than nominal damages; and you have all the latitude between those two sums in determining what the damages are to the plaintiff, and I do not see that I can aid you any further in regard to the matter.[13]

TRESPASS.

§ 821. Exemplary Damages—In Trespass. (a) If the jury believe, from the evidence, that a trespass was committed, as charged in the declaration, by the defendant, or his servants, by his direction, in a wanton, willful and insulting manner, and that the plaintiff has suffered any actual damage therefrom, then the jury are authorized to find exemplary damages; that is, such damages as will compensate the plaintiff for the wrong done to him, and to punish the defendant, and to furnish an example to deter others from the like practices.[14]

(b) In action of trespass to persons or property, when the evidence shows the trespass to have been malicious and willful, oppressive, or wantonly reckless, the jury may give what are known as punitive or exemplary damages.[15]

(c) To justify the recovery of exemplary damages for a trespass

13—Bishop v. Journal Newspaper Co., 168 Mass. 327, 47 N. E. 119 (120).

14—4 Sutherland Dam. (3d. Ed.), Sec. 1031; Sedg. Dam. 35; Cutler v. Smith, 57 Ill. 252.

15—Ill. & St. L. Rd. Co. v. Cobb, 68 Ill. 53.

to property, it must be shown, by the evidence, that the defendant was actuated by malice or a reckless disregard of the plaintiff's rights, and when two are sued, and one of them is not chargeable with malice or recklessness, exemplary damages cannot be recovered against both.[16]

§ 822. **Trespass upon Land—Smart Money or Exemplary Damages.** (a) If you conclude that plaintiff is entitled to recover possession of the land, and that it is in her lawful possession, and the defendant trespassed upon it, then she would be entitled to such damages, under the testimony, as you see proper to give, either actual or punitive damages. If it was entered in a high-handed, malicious, outrageous way, and was a willful invasion of her rights, then the jury could award, in addition to such actual damages as have been sustained, such damages, in the way of punishment, or "smart money," as it is called, as they see proper.[17]

(b) As to the amount of such exemplary damages the jury are instructed that it might be such as, in the discretion of the jury, you should deem just and proper under the circumstances, and sufficient, considering the financial ability of defendants, to justly punish them and serve as a warning to others.

(c) The jury are instructed that if they should find that defendants trespassed upon the lands of plaintiff in the assertion of a supposed right, and without wrong intention, and without such recklessness as to show malice or conscious disregard for the rights of others, then you would not be justified in giving punitive or exemplary damages; to authorize exemplary damages, the jury must find that defendants trespassed upon the land of plaintiff, and that he was damaged thereby, and further that the trespass was done wantonly, willfully, maliciously or with intent to injure plaintiff's property, or deprive him of its use; if the trespass was without wrong intention, but in the belief that they had a right to go upon the lands with their sheep, and that the acts were done without malice or willful intention to injure the plaintiff, then the jury should assess only such damage as you shall find from the evidence to have been actually sustained prior to the bringing of the suit; that exemplary damages cannot be given, except in extreme cases where the malicious intention to willfully injure has been clearly shown; and unless the same has been proven to the satisfaction of the jury, by a preponderance of the evidence, no sum whatever as punitive, vindictive or exemplary damages can be awarded. The jury are further instructed that the plaintiff is not entitled to any damage either as compensation or otherwise for any trespass other than that alleged in the petition, nor for any trespass occurring since the commencement of the action.[18]

16—Becker v. Dupree, 75 Ill. 167.

17—Connor v. Johnson, 59 S. C. 115, 37 S. E. 240.

18—Cosgriff et al. v. Miller, 10 Wyo. 190, 68 Pac. 206 (213), 98 Am. St. R. 977.

§ 823. **Smart Money in Suit Against Corporation.** The court charges the jury that if you find for the plaintiff, you may if actual malice has been shown, in addition to compensatory damages, allow a further sum by way of punitive or exemplary damages.[19]

§ 824. **Growing Crops.** The measure of damage is the value of the crop destroyed, taking into consideration its market value after harvested, and the cost of seeding, caring for, harvesting and marketing the crop, and the value of the crop is measured by the amount of crop produced on like and similar lands in the neighborhood in which the land is located, taking into consideration all elements as to the probable yield of the land in controversy.[20]

§ 825. **Herding Cattle on Plaintiff's Land.** (a) The measure of the plaintiff's damage for the loss or injury to the grass for the years 1886 and 1887, if you find that he has sustained any damages in that regard, will be the actual damage done to the grass crop for these years by the defendant's cattle; that is, the difference between the actual market value of the crop upon the land for those years as it was and what its market value would have been had the plaintiff's cattle not been driven or herded or pastured upon the land. To state it in other words, the question for you to determine from the evidence in fixing the amount of damages, if any, on this claim is how much less was the actual rental value of the land for the grass crop of these years by reason of the defendant's cattle having been driven or herded upon the land than it would have been had the cattle not been driven or herded upon the land.

(b) If you find that the plaintiff is entitled to recover in this case, you will ascertain whether he has sustained any damages by reason of any permanent injury to the growth of grass on said land. The plaintiff's damages upon this claim, if he is entitled to recover

19—Bingham v. Lipman Wolfe & Co., 40 Ore. 363, 67 Pac. 98 (101). The court said that prior decisions had committed it to the doctrine that punitive or vindictive damages might be recovered in cases of tort, citing Sullivan v. Navigation Co., 12 Ore. 392, 7 Pac. 508, 53 Am. Rep. 364; Kelley v. Highfield, 15 Ore. 277, 14 Pac. 744; Day v. Holland, Id. 464, 15 Pac. 855; Oaman v. Winters, 30 Ore. 177, 46 Pac. 780; Brown v. Swineford, 44 Wis. 282, 28 Am. Rep. 582. There is a conflict of authority as to whether a corporation should be liable in damages for an injury caused by the misconduct of its agent unless the act was previously authorized or subsequently ratified by the governing body of the corporation. 5 Thomp. Corps. §§ 6384, 6389.

The court in conclusion said, "Whatever the rule may be, however, where it is sought to charge a corporation with exemplary damages on account of the malicious acts of its subordinate agents, there can be no room for controversy that where, as in this case, the officers actually wielding the whole executive power of the corporation participated in and directed all that was planned and done, their malicious, wanton, or oppressive intent may be treated as the intent of the corporation itself, for which it is liable to answer in exemplary damages. D. & R. G. R. Co. v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. Ed. 1146."

20—"The above statement of the law is in accordance with the principles announced by this court in Colorado Cons. Land & Water Co. v. Hartman, 5 Colo. App. 150, 38 Pac. 62." Catlin Consolidated Canal Co. v. Euster, 19 Colo. App. 117, 73 Pac. 846 (847).

any, will be such only as injuriously affect the market value of the land, and must be fixed at the difference between the actual market value of the land at the time the defendant's cattle ceased to be herded upon said land and what would have been its market value at that time if the cattle had not been herded or driven upon it at all; or, in other words, the question here to be determined is, how much less, if any, was the land worth in the market by reason of the defendant's cattle having been driven or herded upon the land than it would have been had the cattle not been herded or driven on the land.

(c) If you find from the evidence that the plaintiff is entitled to recover damages from the defendants, you will declare the same by your verdict; but in determining the amount of damages you must confine the same to the damages committed by the defendant's cattle. You will not allow him for any injuries to the grass on the land that may have been committed by other cattle, nor will you allow him damages for any injuries that may have been committed in prior years, or prior to the time of giving the notice, if one was given, as has been defined to you in these instructions.[21]

§ 826. Destroying Sign. The plaintiff is entitled to recover as its measure of damages in this action such amount as will compensate it for the loss it sustained in consequence of defendant's wrongful act in erasing and marking out the sign in question, the cost of replacing said sign, including railroad fare of workmen from Chicago or elsewhere, if sent specially for that purpose, together with hotel bills to plaintiff. The actual cost of repairing, replacing and maintaining said sign under its contract to the Durham tobacco people is plaintiff's full measure of damages, and this you will ascertain and allow in such sum as, from a preponderance of the evidence, you find to be such cost; but you cannot allow exemplary damages,—that is, you must not assess damages for the purposes of punishing the defendant.[22]

VICIOUS ANIMALS.

§ 827. What to Consider in Assessing Damages. If, under the evidence and instructions, you find a verdict for the plaintiff, you shall assess his damages in such sum as you may believe will compensate plaintiff: First. For his physical and mental suffering, if

21—Harrison v. Adamson, 86 Iowa 693, 53 N. W. 334 (335).

22—Shiverick et al v. Gunning Co., 58 Neb. 29, 78 N. W. 460-462.

"Ordinarily, the reasonable cost and expense of replacing or restoring the sign each time it was obliterated by the defendant was the proper measure of damages. 3 Sedg. Dam. (8th Ed.) para. 932; Harrison v. Kiser, 79 Ga. 588, 4 S. E. 320; Graessle v. Carpenter, 70 Iowa 166, 30 N. W. 392; Vermilya v. C. M. & St. P. R. Co., 66 Iowa 606, 24 N. W. 234, 55 Am. Rep. 279. As to the allowance for railroad fare and hotel bills, these might or might not be proper elements of damages according to the circumstances of the case."

any, directly caused by his injuries: provided, such injuries must be the direct result of the force and violence of the attack and striking by the cow. Second. If injuries were caused upon plaintiff which are of a permanent character, then you may award him damages such as will reasonably compensate for such permanent injuries. Third. For any expense incurred for medical attendance, made necessary in the treatment and cure of his injuries. Such damages, however, shall not, altogether, exceed the sum of two thousand dollars.[23]

The jury are instructed that, before they can find exemplary damages, they must believe that plaintiff has established by a preponderance of the evidence that the defendant owned the dog that bit plaintiff; that he knew the dog was of a vicious and dangerous disposition; and, so knowing, let the dog run at large, with a reckless disregard of the right of the public at large.[24]

MISCELLANEOUS.

§ 828. **Wrongful Eviction—Without Probable Cause and with Malice.** In some torts the entire injury is to the peace, happiness and feeling of the plaintiffs. In such cases no measure of damages can be prescribed, except the enlightened conscience of impartial jurors.[25]

§ 829. **Eviction—What Damages Should Cover.** If you find from the evidence that the plaintiff is entitled to recover, you should assess as his damages an amount sufficient to cover the value of the tools, furniture and fixtures that were taken away and not returned; for the damages to the tools, furniture and fixtures that were taken away and returned; for the loss of materials taken away and not returned; for the amount paid in rent by the plaintiff for the time he was dispossessed of the offices; for the value of the signs that were taken away and not returned, and for the expense of replacing the same, and the expense of repairing, cleaning and replacing the furniture, fixtures and tools in the office.[26]

23—In O'Neill v. Blase, 94 Mo. App. 648, 68 S. W. 764 (770), the court said:

"This instruction was plainly correct, as far as it went. If defendant desired more definite instructions, they should have been requested. Wheeler v. Bowles, 163 Mo. 398, 63 S. W. 675. The rule which the trial court laid down on the measure of damages was sound. It conforms to instructions approved by courts of last resort in Missouri. Porter v. Railroad Co., 71 Mo. 74, 36 Am. Rep. 454; Russell v. Town of Columbia, 74 Mo. 488, 41 Am. Rep. 325; Stephens v. Railroad Co., 96 Mo. 215, 9 S. W. 589, 9 Am. St. Rep. 336; Bigelow v. Railway Co. (K. C.), 48 Mo. App. 367."

24—Triolo v. Foster, — Tex. Civ. App. —, 58 S. W. 698.

25—Mitchell et al v. Andrews, 94 Ga. 611, 20 S. E. 130.

"Alleged to be error, in that it was given without qualification, and was calculated to mislead the jury. While there was no proof of actual damages, there was proof of the kind of business plaintiff was engaged in, and that it was the only business of the kind in H. at the time."

26—Paxson v. Dean, 31 Ind. App. 46, 67 N. E. 112.

§ 830. **Fraud and Deceit—Exemplary Damages.** The jury are instructed, that in an action founded in fraud and deceit, if the jury find the defendant guilty, the amount of recovery is not necessarily confined or limited to the actual damages sustained. If the fraud or deceit is shown, by the evidence, to have been deliberate, willful and wanton, the jury are at liberty to give exemplary or punitive damages, in addition to the actual damages sustained.[27]

§ 831. **Difference Between Actual Value and Represented Value.** The jury are instructed, that if they find the defendants, or either of them, guilty, then the measure of the actual damage, if any, sustained by the plaintiff, is the difference between the actual value of the property in question, in the condition it was in when sold, and the value of the same property if it had been as stated and represented by the defendant, at the time of the sale.[28]

§ 832. **Insurance—Damaged Goods.** You are instructed that, if the goods insured could not, in ordinary course of trade or business, be sold at as high prices after as before the fire, such difference was an actual damage, for which the plaintiffs are entitled to recover; and the aggregate of these sums will be the amount of plaintiff's loss or damages.[29]

§ 833. **Injury to Premises by Fire—Damages.** If you find for the plaintiff, you will award him such damages as will justly compensate him for the injury he has suffered by reason of the fire in question having run and burned over his premises hereinbefore described.[30]

§ 834. **Malpractice—What May Be Considered in Fixing Damages.** That the jury, in fixing the damage, may take into consideration the injury the plaintiff sustained by the unskillful treatment of the case. Of such would be the pain, loss of time, suffering, loss of teeth, and increased delay in effecting a cure, and probability of permanent injury, necessarily consequent upon the injury sustained by the maltreatment.[31]

§ 835. **Damages for Failure to Deliver Telegrams—Notice of Importance on the Face of the Telegram.** (a) Unless you believe from

27—McAvoy v. Wright, 25 Ind. 22.

28—4 Sutherland Dam. (3d Ed.), Sec. 1171. Sedg. on Meas. of Dam. 338; Thompson v. Burgey, 36 Penn. 403; Page v. Parker, 40 N. H. 47.

29—Read v. State Ins. Co., 103 Iowa 307, 72 N. W. 665 (668), 64 Am. St. Rep. 180.

"It is said the measure of damages is the difference between the market value of the goods immediately before and after the fire. That is what the court told the jury. The fair market value is what property will bring in the ordinary course of trade or business. It is claimed depreciation from other causes might be considered under this instruction. But in stating the issues the jury were told that damages occasioned by fire were claimed, and such damages only were under consideration. If the goods decreased in value from cost from other causes, this would be taken into account in determining what they were worth at that time. All the evidence was directed to fixing the value before and after the fire. The jury could not have failed to understand this instruction to mean all defendant claims it should."

30—Wickham v. Wolcott, — Neb. —, 95 N. W. 366.

31—McCracken v. Smathers, 122 N. C. 799, 29 S. E. 354 (355); 4 Sutherland Dam. (3d Ed.), Sec. 1246.

the evidence that the defendant had notice that plaintiff would sustain any damages, except as such notice appears upon the face of the telegram, and that plaintiff's wife needed his attention, you will find a verdict for defendant.[32]

(b) The jury are instructed, if they find for plaintiff, to allow him such a sum as you believe from the evidence would be fair compensation for the mental anguish, if any, suffered by him by reason of being unable to attend the funeral of his son. In this connection you are instructed that you cannot allow plaintiff anything for the natural grief caused by the death of his said son, but can only allow him for the mental anguish caused by being prevented from attending his funeral.[33]

(c) If you find a verdict for the plaintiff under the foregoing charge, then in estimating the damage of plaintiff, if any, you will take into consideration the mental suffering undergone by plaintiff, if any, by reason of his not being present during the last hours of his mother's life.[34]

32—Wolf v. W. U. Tel. Co., — Tex. —, 94 S. W. 1063.

"While the telegram may have shown upon its face it was important, if appellee's agent was not informed of the facts from which such damages as are claimed may have accrued, it was essential that it indicate upon its face that such damages, or of a similar nature, might flow from a failure to properly transmit and expeditiously deliver it; for plaintiff would only be entitled to recover such damages as might have reasonably been supposed to have been in contemplation by himself and defendant when the contract to transmit and deliver the message was made. It appears from the statement of facts in this case that upon the trial plaintiff's counsel stated to the court that he did not rely upon the language upon the face of the telegram to charge the defendant with notice of the damages alleged to have been sustained as set forth in the petition, and that the court in making up the charge to the jury upon the law should charge the jury that the defendant must have had notice of the facts set forth in the petition upon which plaintiff's damages arise from some other source than that contained upon the face of the telegram, and that the court indicated to counsel, at the time and before the charge was prepared and given, that it would conform to the views of plaintiff's counsel in reference to the notice of the damages in preparing and submitting the charge upon the law. If it were not apparent from the face of the message that it furnished no intimation that damages of the nature claimed were contemplated by the parties, the statement of plaintiff's counsel authorized the court to place that construction upon it, and precluded plaintiff from complaining of the charge in which it was done. Gresham v. Harcourt, 93 Tex. 157, 53 S. W. 1019; Telegraph Co. v. Kirkpatrick, 76 Tex. 217, 13 S. W. 70, 18 Am. St. Rep. 37; Telegraph Co. v. Smith, 76 Tex. 254, 13 S. W. 169; Telegraph Co. v. Ragland, — Tex. Civ. App. —, 61 S. W. 421."

33—W. U. Tel. Co. v. Chambers, 34 Tex. Civ. App. 17, 77 S. W. 273 (274).

34—W. U. Tel. Co. v. Waller, — Tex. —, 84 S. W. 695 (696).

"It is objected to this charge that it furnishes no guide to the jury for ascertaining the damage or amount to be awarded to the appellee. But it can hardly be said that the charge furnishes no guide for estimating the damages. It correctly directs the jury to take into consideration the mental suffering undergone by appellee by reason of his not being present during the last hours of his mother's life. This was not affirmatively erroneous, and if the charge was deficient or not sufficiently full the appellant should have requested a more specific instruction."

§ 836. **Damages for Failure to Deliver Telegram—May Recover for Mental Suffering, Sorrow and Anguish—Limitation of the Rule.** If the jury find for the plaintiff, then you are instructed that in estimating the amount or measure of damages, if any, to which plaintiff may be entitled, by reason of the alleged negligence of the defendant company, its agent, servant, and employe, in failing to transmit and deliver said telegram from Dr. and Mrs. B. to Mrs. A., with due diligence, if you find there was such failure, you should consider and estimate only such damages as plaintiff may have sustained by reason of such negligence, if any. You are instructed further, however, in estimating the plaintiff's damages, if any, you find she is entitled to recover, you may consider the mental suffering, sorrow and anguish, if any, suffered by the plaintiff by reason of the negligence of the defendant company, if any; but in this connection you are instructed that you should not estimate or award any damage to the plaintiff on account of any anguish, sorrow and mental suffering caused by the death of her husband, or for causes other than those resulting from the wrongful and negligent acts, if any, of the defendant company, its agent, servant and employe, or one so held out by it to the public. But, you may consider whether or not the plaintiff suffered any additional pain, anguish, sorrow and mental suffering by reason of such negligence if any on the part of defendant company and such damages if any, you may consider as an element of actual damages to such an amount as you may deem to be reasonable compensation for such additional sorrow, pain and mental anguish, if any.[35]

§ 837. **Warehousemen—Damages—Difference in Value.** The court instructs the jury that, if you find in favor of plaintiff, your verdict should be for the difference between the reasonable market value of the 141 bales of cotton in its damaged condition on June 30, 1903, and the reasonable market value thereof at that time if it had not been damaged. To this sum the jury may also, if you see fit, add the interest thereon at 6 per cent per annum from October 20, 1903, the date plaintiff demanded payment from defendant.[36]

§ 838. **Damage to Goods—"Inherent Qualities."** The jury are instructed that the phrase "inherent qualities" as used in the warehouse receipt offered in evidence means and refers to natural qualities and characteristics pertaining to the flour named in the receipt, which would cause loss or damage if the flour were uninfluenced by matter outside of itself or by conditions in which the flour might be placed. And if you believe, from the evidence in this case that the flour of the plaintiff was damaged in the warehouse of the defendant, and if you further believe that such damage was caused by a smell and taste being communicated to the flour from something out-

35—W. U. Tel. Co. v. Carter, — Tex. —, 94 S. W. 206.

36—Prince v. St. Louis Cotton C. Co., 112 Mo. App. 49, 86 S. W. 873 (877).

side of the flour, then the defendant is not exempted from liability by reason of the use in the contract of the phrase "inherent qualities" above mentioned.[37]

§ 839. **Passenger Expelled for Refusal to Pay Excess Fare on Train—Allegation of "Ticket Window" Being Closed—Measure of Damages—What May be Taken into Consideration by Jury in Assessing Damages.** (a) The court instructs the jury that where a railroad company keeps in its depot or station building a particular place for the sale of tickets, separate from places for the transaction of other business, as an opening in a particular wall and designates such place by some appropriate sign as "Tickets" or "Ticket Window" or, by general custom or habit, uses such opening or other place for the sale of its tickets, a passenger has the right to apply at such place for his ticket, and to rely upon procuring it there; and where such opening or place is closed, so that applications for tickets cannot be made there, and there is no other place generally and customarily used by the public or advertised by the company, as a place to procure tickets, or known to the passenger in question as a place for procuring tickets, and no agent in or about the waiting room of such depot or station building ready upon call to sell tickets, or who responds to a call for a ticket, such ticket office is not open, or kept open, within the meaning of the law.

(b) Hence, if you believe from the evidence in this case that the Hillsboro station on defendant's line of road, on the day the plaintiff got on the defendant's train it did not keep its ticket office open in some of the manners and for the time hereinbefore stated so that the plaintiff was unable to purchase ticket before entering the cars, the defendant's employes had no right to demand an excess fare from him, or to expel him from the cars for refusing to pay it.

(c) If a person is wrongfully expelled from a railroad train, he is entitled to recover all damages he has actually sustained, such as loss of time consequent thereon; the labor, inconvenience and expense, if any, incident to traveling at another time, or by other modes of conveyance, to the place he was endeavoring to reach; for the physical pain endured by him in being exposed to the heat of the sun and force of the elements; and such mental suffering as grows immediately out of, or results directly from, such physical pain; and also such damages as will compensate for the suffering of outraged and humiliated feelings natural to a man who is compelled to submit to such indignity in such a public place.

(d) Hence, in this case, if you believe from the evidence that plaintiff is entitled to recover at all, he should be allowed, as a matter of right, to the compensation for the labor and inconvenience, delay and loss of time, in being compelled to go to his destination at

37—Sibley Warehouse & S. Co. v. Durand, 102 Ill. App. 406 (410), aff'd 200 Ill. 354, 65 N. E. 676.

another time, and by other modes of conveyance; for the physical pain endured by him, which resulted from exposure to the heat of the sun after his expulsion; and such mental suffering as resulted directly from such physical pain, and also upon such humiliation and degradation as were imposed upon him by being compelled to leave the train under the imputation, publicly cast upon him, of having refused to pay his fare, or having violated the relations of passenger and carrier between himself and the company. But, of course, if any of these items or elements of damage have not been proven by the plaintiff, or are not naturally and logically deducible from the act of expulsion, with its attendant circumstances, nothing can be awarded for the same.

(e) If you find for the plaintiff, you are instructed that, in assessing plaintiff's damages, you cannot exceed the sum sued for in the complaint, which is twenty-five thousand dollars; and in assessing the damages it is proper that you consider the injuries received by plaintiff, their extent, whether of a temporary or permanent character, and you may take into consideration loss of time, expenses incurred, physical suffering, bodily pain, and permanent disability, if proved to be direct results of the injuries described in the complaint, and you should thereupon assess such compensatory damages as in your opinion the evidence before you warrants.[38]

38—This series of instructions was approved in L. N. A. & C. Ry. Co. v. Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197.

CHAPTER XLII.

DAMAGES, MEASURE OF—EMINENT DOMAIN.

See Erroneous Instructions, same chapter head, Vol. III.

Note.—Concerning the amount of damages or the principles upon which compensation is to be measured to the owner of property taken for public use there are no fixed rules embracing the whole subject universally applicable throughout the different states. In determining the *quantum* of damage, regard must be had to any constitutional or statutory provisions relating to the subject and also to the previous course of decisions in which those provisions have not unfrequently originated. In states where the subject is not expressly regulated by positive law the books abound in cases which cannot be reconciled respecting what is and what is not proper to be taken into consideration in the way of benefits on one hand or of injuries on the other. 2 Dillon on Munic. Corp., § 486.

§ 840. Private Property Shall Not be Taken or Damaged for Public Use without Just Compensation—Constitutional Provision. The constitution of this state declares: "Private property shall not be taken or damaged for public use without just compensation," and the jury are instructed it will be presumed the framers of that instrument used the word "damaged" in that connection in its ordinary and popular sense, which is hurt, injury or loss, and "that the damage contemplated by the constitution" in cases where no land is actually taken must be an actual diminution of present market value or price caused by constructing and operating the road, or a physical injury to property that renders it less valuable in the market if offered for sale.[1]

§ 841. Just Compensation Defined. (a) The court instructs the jury that it is their duty in this case to ascertain from the evidence the just compensation to be made to the several claimants for the property to be taken or damaged by the proposed improvement.

1—L. E. & W. R. R. Co. v. Scott, 132 Ill. 429 (433), 24 N. E. 78, 8 L. R. A. 330.
For an exhaustive review of the constitutional provisions in the various states, see 1. Lewis on Em. Domain (2d ed.), chapter 2, where the constitutional provisions of each state are given.

(b) Just compensation means the payment of such a sum of money to the owner of the property proposed to be taken or damaged as will make him whole, so that upon the receipt by him of the compensation and damage awarded he will not be any poorer by reason of his property being so taken or damaged.[2]

(c) The jury are instructed that just compensation means the payment of such sum of money as will make the defendant whole, so that, on receipt by the defendant of the compensation and damages awarded, he will not be poorer by reason of his property being taken or damaged.[3]

§ 842. **Compensation Covers What Injuries.** In cases of this kind damages are assessed and compensation made once for all, and this proceeding will forever bar the claimant and all persons holding the property under him from any future claim for damages resulting from the building and operation of the contemplated road in an ordinary and careful manner. The compensation is, therefore, to be determined according to the full measure of the rights acquired by the corporation, and not according to the mode in which they propose to exercise those rights in the first instance. The damages to be assessed include all the injury to the remaining portion of the land by cutting off access to or egress from the different parts of the farm, or in rendering it inconvenient for use by cutting it up into irregular pieces or in any manner rendering it less suitable for convenient and profitable occupation and use, or for cutting it up into lots, provided the jury believe from the evidence that the construction and operation of the contemplated road across the claimant's farm will injuriously affect its value in any of these modes.[4]

§ 843. **Fair Cash Market Value—Projected Improvement Considered.** (a) The jury are further instructed that the defendants in this case are each entitled to the fair cash market value on the (date of filing the petition) of their respective lots sought to be taken, regardless of the causes which give them value at that time. If the jury believe from the evidence in the case, including their own view, that the value of said lots, or any of them, on that day was owing, in whole or part, to the projection by the plaintiff of the improvement to its railroad facilities for which it seeks to condemn said lots, still the owners of said lots are entitled to the fair cash market value of said lots as they then stood.[5]

2—Bigelow v. W. W. Rd. Co., 27 Wis. 478; 1 Redfld. on Ry. 261, 2 Lewis on Em. Domain (2d ed.), sec. 462.

3—Phillips v. City of Scales Mound, 195 Ill. 352 (363), 63 N. E. 180.

"In M. W. S. E. Ry. Co. v. Stickney, 150 Ill. 362, 37 N. E. 1098, 26 L. R. A. 773, it was held that this language used in an instruction given in that case was an accurate statement of the law."

4—Drury v. Midland Rd. Co., 127 Mass. 571; C. & I. Rd. Co. v. Hopkins, 90 Ill. 316; 1 Redfld. on Rv., 288; 2 Lewis on Em. Domain (2d ed.), secs. 478-479-479a.

5—R. I. & P. Ry. Co. v. Leisy B. Co., 174 Ill. 547 (549), 51 N. E. 572.

(b) The jury are further instructed that they are not to consider the price which the property would sell for under special or extraordinary circumstances, but its fair cash market value if sold in the market, under ordinary circumstances, for cash, and not on time, and assuming that the owners are willing to sell and the purchasers are willing to buy.[6]

§ 844. **Actual Cash Market Value—Special Price not Considered.** The jury are instructed that in considering the compensation to be paid to the defendant for the land about to be taken, they are to fix the actual cash market value of the land taken. And they are further instructed that they are not to consider the price which the property will sell for under special or extraordinary circumstances but its fair cash market value if sold in the market under ordinary circumstances for cash and not on time, and assuming that the owners are willing to sell and the purchaser is willing to buy.[7]

§ 845. **Actual, Fair, Cash Market Value—What Owner or Juror Would Take is Incompetent.** In assessing the value of the land actually taken and the damages to the land not taken, you should not assess the same on the basis of what the owner would take for the same, or any part thereof, or what you would take and let the railroad go across the lands if you were the owner of them. These are improper to be taken into consideration, either in fixing the value of the land taken, or in assessing the damages to the land not taken; but you should at all times keep in mind that the actual fair cash market value of the lands taken and the decrease, if any, in the actual fair cash market value of the lands and property not taken by reason of the construction and operation of the railroad are the proper measure of damages and compensation which you are to ascertain in this case.[8]

6—Phillips v. Town of Scales Mound, 195 Ill. 353 (362), 63 N. E. 180; Brown v. C. R. Ry. Co., 125 id. 600, 18 N. E. 283; Kiernan v. Chi. S. Fe & C. Ry. Co., 123 id. 188, 14 N. E. 18; C. R. Ry. Co. v. Moore, 124 id. 329, 15 N. E. 761.

7—Brown v. Calumet R. Ry. Co., 125 Ill. 600 (606), 18 N. E. 283.

"This precise form of instruction was approved in Kiernan v. C. S. Fe and Cal. Ry. Co., 123 Ill. 188, 14 N. E. 18, and Calumet River Ry. Co. v. Moore, 124 id. 329, 15 N. E. 764. In legal contemplation, the present market value of property is its present cash value in market, unless something is said showing that a valuation on a time sale is intended."

8—Kiernan v. Chicago, Santa Fe & Cal. R. R. Co., 123 Ill. 188 (195), 14 N. E. 18.

"It is admitted that the first clause of the instruction is correct, but the objection taken to the instruction is to that portion of the second clause which says the matters in the first clause were improper to be taken into consideration fixing the damages. If the damages should not be assessed upon the basis of those matters, as is conceded, then we do not see that it was improper to say that they should not be taken into consideration in assessing the damages. The proper measure of damages and compensation was given in a subsequent part of the instruction, J. & S. E. R. R. Co. v. Walsh, 106 Ill. 255; C. & E. R. R. Co. v. Jacobs, 110 id. 416; Dupuis v. C. & N. W. Ry. Co., 115 id. 99, 3 N. E. 720; and to the instruction as a whole we perceive no substantial objection."

§ 846. **Estimating Damages—Other Use to Which Property May be Used—Use for Which Property is Suitable and Adapted.** (a) The court further instructs the jury that, while it is proper for witnesses, in making their estimate of damages to be allowed the defendant, to take into consideration any use to which they believe from the evidence the property in question may be profitably appropriated, yet the jury are not bound to base their verdict upon the supposition that it would be appropriated to a use other than that to which it is now devoted.[9]

(b) The court instructs the jury that in fixing the amount of compensation to be paid to the defendants, severally, you should take into consideration the use for which the property is suitable and to which it is adapted, having regard for its situation and the business wants of that locality, or such as may reasonably be expected in the near future, so far as the same appears from the evidence; and so far as the same affects its market value on the date of filing petition.[10]

§ 847. **Land Available for Manufacturing Purposes—Flow of Water.** The jury are instructed that where property is taken for public purposes the owner is entitled to its fair market cash value for the uses to which it may be most advantageously applied, for which it would sell for the highest price in the market; and if you should find from the evidence in this case that portions of the land taken border on the shores of C. Bay, and that the lands immediately in front thereof are available for manufacturing purposes of any kind, and that, in order to utilize, lease, or sell them for such purposes, it would be necessary to have fresh water; that on the other portions of land not taken there is fresh water sufficient for the purpose; and that the construction of this road will interfere with the bringing of the water over the right of way—this is an element that you should have a right to consider in estimating the damages sustained. In this connection you should also take into consideration the fact that the railway company has stipulated in this case and agreed to construct culverts upon its right of way, under its track, for the transmission of water from all springs now upon the uplands not taken, and that the railway company would be bound by such stipulation to construct its road in such manner as to permit the flow of the water from such springs across its right of way.[11]

9—Phillips v. Town of Scales Mound, 195 Ill. 353 (362), 63 N. E. 180.

"The language used in this instruction was used by this court in Snodgrass v. City of Chicago, 152 Ill. 600, 38 N. E. 790, and upon the authority of the latter case, the instruction cannot be regarded as erroneous."

10—R. I. & P. Ry. Co. v. Leisy B. Co., 174 Ill. 547 (550), 51 N. E. 572.

11—S. & N. Ry. Co. v. Roeder et al., 30 Wash. 244, 70 Pac. 498 (504), 94 Am. St. Rep. 864.

§ 848. **Measure of Damages—Loss of Probable Profits of Business—Procuring Another Place of Business.** The court instructs the jury that the measure of plaintiff's recovery is limited to the loss of probable profits of his business, if any, shown by the evidence from the time of the construction of the railroad track on Chestnut Street and its operation, and such time as the plaintiff might, in the opinion of the jury, by the use of reasonable diligence, have procured another place of business equally eligible for the transaction of business of the kind he was engaged in, including a reasonable time for removal to the same.[12]

§ 849. **Future Loss in Construction of Buildings in Lessening Business in Such Buildings—Remote and Speculative Damages.** The jury are instructed that, in arriving at your verdict, you are not entitled to consider any depreciation in the fair cash market value of the plaintiffs' lots due to the construction of the viaduct, even if you find from the evidence that such depreciation has taken place, which has been caused by its effect in lessening the extent of the business which the jury may believe, from the evidence, would otherwise be done upon said lots if buildings should in future be constructed thereon produced by the character and extent of the present and future travel and traffic by the general public upon Halsted street in front of the plaintiff's lots, for the court instructs you that among the reasons therefor such supposed effects are too remote and speculative to be made the basis of any recovery in this action. What the future may develop respecting the value or use of this property cannot be considered by you whether an advantage or disadvantage. Your province is to determine from the evidence, and your view of the premises, whether or not the fair cash market value of the property was worth less after the viaduct was constructed by reason thereof than it was before it was constructed; if so, you should find for the plaintiffs, and if not, your verdict should be for the defendant.[13]

§ 850. **Depreciation in Value of Property on Account of Public Improvements, etc.** (a) The court instructs the jury that the constitution of the State of Illinois provides that "private property shall not be taken or damaged for public use without just compensation." If you believe from the evidence in this case that the property of the plaintiffs described in the declaration has been depreciated in value by reason of the erection and construction of the viaduct on ——— street and the elevation of the grade of ——— and ——— streets in front and alongside of the plaintiffs' property, then you are instructed that the plaintiffs are entitled to recover of and from the city of Chicago the amount of the depreciation in value so sustained by them to the property afore-

12—Penn. Mutual Life Ins. Co. et al. v. Heiss et al., 141 Ill. 35 (67), 31 N. E. 138, 33 Am. St. Rep. 273. "This instruction lays down the correct rule."

13—City of Chicago v. Spoor, 91

said as shown by the evidence, and you should find the defendant guilty and assess the plaintiffs' damages at such sum as will compensate them for the depreciation in value so sustained.[14]

(b) The actual amount of pecuniary loss to the plaintiff is not necessarily the rule of damages in actions like the present. In estimating the amount of compensation to the plaintiff for the injury, if any, found to have been sustained by it, the jury may determine the extent of the injury and the equivalent damages, in view of all the circumstances of said injury to said plaintiff, of depreciation in the value of its property during the period embraced in this suit, and of interference with the uses to which said property was devoted by said plaintiff during said period, and of all other particulars, if any, wherein the plaintiff is shown to have been injured during said period, and for which, under the instructions of the court, said plaintiff is entitled to recover.[15]

§ 851. Benefits Peculiar to Land May be Deducted from Amount of Damages. (a) The jury are instructed, that if they find from the evidence that the plaintiff will enjoy any benefits peculiar to his land from the railroad being built on this street, such benefits must be deducted from his damages, if any are sustained by him; but such benefits as he will enjoy in common with the whole community must not be so deducted.

(b) In estimating the damages arising from (the widening of the street) and the taking of the claimant's land therefor, the jury should allow as a set-off, any special benefits which will accrue to that portion of the lot not taken in consequence of (the widening of the street), provided, the jury believe, from the evidence, that any such special benefit will accrue therefrom. The benefits which may be thus deducted or set off, are such as are direct and special to the property of the claimant, but not general benefits shared by his land in common with other land in the vicinity, or in common with other lots abutting on the same street, no part of which is taken. Benefits may be direct and special although other lots upon the same street similarly situated will be similarly benefited.[16]

§ 852. Benefits Limited to Such as are Derived from the Improvement—Possible Benefits to be Excluded. (a) The jury are instructed that in estimating the benefits that may accrue to the premises of the objectors or any of their premises by the proposed improvement, they should limit such estimates of benefits to such

Ill. App. 472 (474), affd. 190 Ill. 340, 60 N. E. 540.

14—"There could be no reasonable criticism of the instruction as a whole." City of Chicago v. Spoor, 91 Ill. App 472 (474), aff'd 190 Ill. 340, 60 N. E. 540.

15—B. & P. R. R. Co. v. Fifth Bap. Church, 108 U. S. 317 (322).

16—Parks v. Hampden, 20 Mass. 395; Cross v. Plymouth, 125 Mass. 557; 2 Lewis on Em. Domain (2d ed.), sec. 469.

benefits as are derived from the improvement described in the ordinance.[17]

(b) The jury are instructed that benefits by the proposed improvements cannot be predicated upon the uncertainties of the future action of the City Council in providing for the construction and building of a bridge on C street, but the benefits in this case must flow directly from the improvement proposed, without reference to such action of the City Council in reference to the construction of said bridge.

(c) If the jury believe, from the evidence, that the premises of the objectors will not be benefited by the proposed improvement unless a bridge be constructed upon the line of such improvement across the south branch of the Chicago river at C street, then their verdict in this case should be for the objectors.[18]

(d) The jury are instructed that in estimating the compensation to be paid for the property to be taken, the jury should exclude from their minds all consideration of possible benefits, if any, to accrue from the improvement to the lots or parts of lots not proposed to be taken.[19]

§ 853. Land Taken for Railroad Right of Way—What May be Considered in Determining Damages. (a) The court instructs the jury, on behalf of plaintiff, that the true measure of compensation where no land is taken for the right of way of a railroad upon which to construct a road-bed and track, is the difference between what the whole property would have sold for unaffected by the railroad and what it would sell for as affected by it.

(b) The jury are further instructed, on behalf of the plaintiff, that in determining whether plaintiff's lands are lessened in value by reason of the construction and the proposed operation of the railroad, the jury may consider the injury to plaintiff's lands, if any is proved, arising from the inconveniences actually brought about and occasioned by the construction of defendant's railroad, although such damage might not be susceptible of definite ascertainment; and may also consider such incidental injury as the proof may show might or would result from the perpetual use of the track for moving trains, or from the inconveniences in using said lands for farming purposes, and in handling stock upon it, if the proof shows such railroad would occasion any such inconveniences; and they may consider generally such damage as the evidence may show, if any is reasonably probable to ensue from the construction and operation of the defendant's said railroad.[20]

17—Hutt et al. v. City of Chicago, 132 Ill. 352, 23 N. E. 1010.

18—Hutt et al. v. City of Chicago, supra.

"The question as to the erection of a bridge we do not regard as one germane to the inquiry before the jury, and the court erred in refusing the instructions relating to that question."

19—Ry. v. Gilson, 8 Watts (Pa.) 243.

20—L. E. & W. R. R. Co. v. Scott, 132 Ill. 429 (433), 24 N. E. 78, 8 L. R. A. 330.

§ 854. **Value of Property Before and After Construction of Railroad.** (a) In determining whether the property in question will be injuriously affected by the building and operation of the railroad, the jury may consider whether the property is adapted to business purposes, or only useful as residence property; but you are only to take these matters into consideration for the purpose of determining whether the value of the property will be depreciated, and the extent of such depreciation by the building and operation of said railroad as contemplated.

(b) You are further instructed, that in no event must the damages exceed the sum which would be obtained by determining the difference between the actual value of the property in question with the railroad constructed and operated in the manner contemplated, and what that value would be, were the railroad not built.

(c) You are instructed that you should not take as a separate and distinct basis for the assessment of damages, such remote contingencies as frightening of horses, liability of fires, danger to persons from passing trains; such contingencies are only to be considered for the purpose of determining whether and to what extent the value of the property will be decreased by the building and operation of the railroad. If, in consequence of its exposure to such dangers, the actual value of the property will be diminished to any extent, then such decrease in value measures the actual loss to the owner.[21]

(d) You are instructed that if you believe, from the evidence, that a large body of land belonging to any defendant adjoins the proposed railroad, and that such large body of land will be worth in the market as much per acre after the construction of the proposed railroad as it now is, then you have no right to assess any damages as to such large body of land adjoining such railroad.[22]

(e) In assessing the claimant's damages your inquiry must be confined to the marketable value of his land before and after the right of way is appropriated, taking into account, in this connection, the number of acres taken for the right of way, the manner of its location, the way his land is cut by the railroad, and all other

21—Blesch v. C. & N. W. R. R., 48 Wis. 168, 2 N. W. 113.

22—Prather v. Chicago So. R. R. Co., 221 Ill. 180 (198), 77 N. E. 430.

"The argument of appellant is, that this instruction told the jury that if they believed the 166 acres of land lying east of the railroad could be sold for as much in the market after as before the construction of the railroad, then they should allow no damages whatever as to this land; that it did not apply to the whole farm of appellant, and stated that the owner was compelled to divide his farm into tracts. The instruction, as we have stated, was general. It did not refer to the 166-acre tract of land in particular, but referred to any large tract of land adjoining the railroad. This clearly meant, and the jury must have so understood it to mean, the entire tract owned by the appellant lying east of the highway. It was not erroneous in that it did not refer, if such be the case, to the 122½-acre tract of appellant's land lying west of the public highway, for the only proof in the record as to this tract shows it was not damaged at all."

like matters appearing in evidence which affect the value of the land, so as to be able to estimate its true market value, as affected by the location of the railroad, before and after such location. The difference in the market value of the land before the appropriation of the strip for right of way and after the right of way is taken, will constitute the claimant's true measure of damages; provided you believe, from the evidence, that the property will be less valuable after the right of way is taken, in consequence of such taking.[23]

(f) The court instructs the jury on behalf of the plaintiff that the true measure of compensation where no land is taken for the right of way upon which to construct a road-bed and track, is the difference between what the whole of the property would have sold for unaffected by the railroad and what it would sell for affected by it.[24]

(g) The jury are instructed that if they find, from the evidence, that the premises of the defendant will sell for more in the open market than it would if the tracks of the plaintiff had not been constructed and operated in the manner shown by the evidence, and that this result was caused by the construction and operation of the tracks of the plaintiff, then they should find for the plaintiff.[25]

§ 855. Impairment of Use by Operation of Trains—Access Rendered More Difficult. (a) If the jury believe, from the evidence, that the running of the cars and locomotives on the street in front of the premises in question, in the usual and ordinary manner of operating such cars and locomotives, will create smoke and cinders and throw them upon the premises, so as materially to impair the reasonable use and enjoyment thereof, then you have a right to take these matters into consideration in determining whether or not the said ———— will be damaged by the location and operation of the railroad; but said damages, if any, must be actual damages, and they can only be considered for the purpose of determining whether the value of the property, with the road con-

23—Hartshorn v. B. C. & N. R. Co., 52 Ia. 613, 3 N. W. 648.

24—Ill. Cen. R. R. Co. v. Schmidgall, 91 Ill. App. 23 (27).

The court said of this instruction: "The instruction substantially states the rule of damages to be the depreciation in the market value of the property in consequence of the building and operating of the railroad. We can discover no serious objection to it. While we are not to be understood as holding that the instruction is entirely accurate, yet the most, if not all of the criticisms passed upon it by the counsel for the appellant are of such a character as required appellant's counsel to ask for more specific directions. While it is not the duty of the counsel on either side to try both sides of the case, it is the defendant's duty to present his defense both by evidence and by instructions to the jury. Bartlett v. Board of Education, 59 Ill. 364; Village of Hyde Park v. Washington Ice Co., 117 Ill. 233, 7 N. E. 523; Title 'Instructions' 11 Ency. of Pl. & Prac., p. 917; Thompson on Trials, secs. 2341-2346."

25—C. & G. W. R. R. Co. v. Wedel, 144 Ill. 9 (14), 32 N. E. 547.

structed, will be less than it would be without the railroad, and the extent of the depreciation in value if any.[26]

(b) If in this cause you find for the plaintiff, the measure of her damage is the sum which you may find that her real estate was depreciated in value by reason of the means of access thereto being impaired or interfered with by the construction and maintenance of said railroad.[27]

§ 856. Extension and Operation of Railroad Causing Diminution in Value of Real Estate. If you shall believe from the evidence in this case, that the defendant constructed the extension of its railroad track near to the plaintiff's property within the last five years prior to bringing this suit, and is operating said railroad as described in plaintiff's declaration, and that plaintiff is the owner in fee of said premises, and that by reason of such extension, construction and operation by the defendant, plaintiff's property described in his declaration is diminished thereby in its market value, then plaintiff has a right to recover, and your verdict should be for him in such sum as, from all the evidence, he is shown to have sustained, if any, by reason thereby.[28]

§ 857. Injuring Property Adjoining Street on Which Railroad is Built. If you believe from the evidence that in the months of ——— and ———, the defendant constructed a line of railroad across and upon C street and S avenue, approaching plaintiff's property, and failed to restore said streets to their former state and condition, and thereby destroyed or impaired said streets as passways to and from plaintiff's property, and took a part of plaintiff's land and constructed its road thereon, and that the construction of said railroad in and across said streets resulted in injury to plaintiff's property, and depreciated the value of said property, then it will be your duty to return a verdict for the plaintiff, and assess his damages at the difference, if any, between the

26—Chicago, etc., R. Co. v. Hall, 90 Ill. 42.

27—P. C. C. & St. L. Ry. Co. v. Noftsker, 26 Ind. App. 614, 60 N. E. 372 (373).

"The instruction, we think, means that appellee could recover in this action any damage to her property because of any cutting off or rendering access to or from the street more difficult or inconvenient, as the court told the jury, in effect, in another instruction given at appellant's request. The question was not appellees' right of access to her property at one or more points, but her right of access along the entire line of her lot; and in determining her damages it was the interference with this that was to be considered."

28—I. C. R. R. Co. v. Turner, 194 Ill. 575, 579, 62 N. E. 798.

"The criticism made upon this instruction is that it assumes that the mere extension of the railroad and its operation, without any proof of the specific items of damage set out in the declaration, are a damage to the plaintiff. We do not think the instruction subject to the criticism. It confines the jury to the evidence, and informs them, if they believe therefrom that plaintiff's property is diminished in its market value by reason of the extension, construction and operation of said road, their verdict should be for the plaintiff for such amount as all the evidence shows him to have sustained."

value of the land just before and just after said railroad was constructed, caused by the construction of said railroad in and across said streets, and also the reasonable value of the strip of land actually taken by the railroad, estimating such value at the time of the taking of the same; making a separate item of the value of the land so taken, if any, from the other damages, if any, you may find.[29]

§ 858. **Property Lessened in Value—Damages not Susceptible of Ascertainment—Inconveniences.** The jury are instructed that, in determining whether plaintiff's property is lessened in value by reason of the construction and proposed operation of the railroad, the jury may consider the injury to plaintiff's property, if any is proved, arising from the inconvenience actually brought about and occasioned by the operation of defendant's railroad, although such damages might not be susceptible of definite ascertainment; and you may consider generally such damage as the evidence may show, if any, is reasonably probable to ensue from the operation of defendant's said railroad.[30]

§ 859. **Measure of Damages; Inconvenience in Workings of a Mine by Construction of Railroad.** The court instructs the jury that, in estimating the damages to the mine of the defendant, they should consider as elements of damage any changes they may believe, from the evidence, to be made necessary by reason of the construction of such railroad in the building of switches, tramways and scales and other improvements connected with the mine, as well as of actual inconvenience and annoyance which the evidence shows will result to the defendants in the operation of their mine, not only for the present but for the future.[31]

29—Red River T. & S. Ry. Co. v. Hughes, 36 Tex. Civ. App. 472, 81 S. W. 1235.

In Rosenthal v. T. B. & H. Ry. Co., 79 Tex. 325, 15 S. W. 268, and D. & P. S. Railway v. O'Maley, 18 Tex. Civ. App. 200, 45 S. W. 225, the court said "the difference in the value of the land just before and just after the construction of the railway is held to be the measure of damages in such cases."

30—Ill. C. R. R. Co. v. Schmidgall, 91 Ill. App. 23 (26).

"It is objected that inconvenience cannot be made the basis of damage. While it is true that every inconvenience is not an actionable wrong, still the inconveniences proven were such as are actionable. Rigney v. City of Chicago, 102 Ill. 64; L. E. & W. R. R. Co. v. Scott, 132 Ill. 429, 24 N. E. 78, 8 L. R. A. 330; C. M. & St. P. Ry. Co. v. Darke, 148 Ill. 226, 35 N. E. 751. The instruction does not assert that all inconveniences may be the basis of actionable damage."

31—C. P. & St. L. Ry. Co. v. Wolf et al., 137 Ill. 360 (366), 27 N. E. 78.

"It is said that this instruction assumes as a fact that each of the several changes in said mining property and its appurtenances made necessary by the construction of said railway, will constitute an element of damage, while as is claimed some of them may in their final results be of essential benefit to said mining property. We are unable to see any force in the objection. If by reason of the construction of the railway, the defendant's switches and side tracks must be taken up and re-laid in whole or in part, their tramway remodelled or rebuilt, their scales taken up and removed to another place, and like changes made in other parts of their property all involving the expenditure of

§ 860. **Value of Building Stone that Can be Taken from the Land Proper to Consider.** In this case, if you should find that land taken contains building stone, you are instructed that the measure of compensation is the fair market value of the land taken with the building stone in it, and the profits or the price of value of such building stone, if the same or any part thereof will be taken by the proposed right of way, should not be considered by you as building stone in arriving at your verdict. The number of tons of building stone that could be gotten from the land, and the value per ton thereof, or the royalties thereon, are not to be considered except as they may guide you in fixing the value of the lands taken or injury to the quarry lands; and as a special rule for your guidance in arriving at the value of any portion of the quarry which you may find from the evidence will be taken, and of the amount of damages to any portion of the quarry which you may find from the evidence will be taken, and of the amount of damages to any portion of the quarry not taken, I instruct that the compensation to be awarded by you to the owners is to be estimated by a reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the near future.[32]

money, as the evidence seems to show will be the case, there can be no doubt that such changes are proper matters to be taken into consideration by the jury in the estimation of damages. It may be that some of these, as, for instance, the tramway, if re-built upon a better plan, of new materials and with a double track, may be more valuable and more serviceable than now, but that makes it none the less true that defendants have a right to have such changes considered by the jury. Said instruction does not seem to be at all in conflict with the rule that if on the whole the construction and operation of said railway will be a benefit rather than a damage to the property not taken, no damage should be given, and in conformity with that rule the jury were instructed at the instance of the appellant in substance that if the contiguous property will be of equal or greater value by reason of the construction and operation of said railway, no damages should be given for injuries to said property. Again, it is said that said instruction assumes as a fact that the construction of said railway will inconvenience and annoy the coal company. We think it is not fairly subject to that criticism. It merely directs the jury in estimating damages to consider all inconveniences or annoyances established by the evidence, but could not have been understood by the jury as intimating an opinion that any actual inconvenience or annoyance was in fact shown."

32—Seattle & M. R. Co. v. Roeder et al., 30 Wash. 244, 70 Pac. 498 (504), 94 Am. St. Rep. 864.

"It is insisted that this instruction is error, because it allows the jury to take into consideration the number of tons of building stone that could be taken from the land, and the value per ton thereof, and the royalties thereon, as a guide in fixing the value of the land taken. Here is a limestone quarry in active operation, convenient, accessible to transportation, where the stone was exposed on the face of the cliff, and easily, readily, and cheaply taken out. The lands were useful principally for the stone lying thereon. The right of way appropriated one-half of this ledge of stone, and ran between the other half and water transportation. The authorities agree that, where land taken contains mineral, the measure of compensation is the sum that would be given for the land with the mineral in it. But any inquiry as to the profits or the price or the value of the minerals if the minerals themselves have

§ 861. Increased Danger from Fires, etc., May be Considered. (a) If you believe, from the evidence, that there will necessarily be an increased danger to the premises in question from fire arising from the building and operation of the contemplated railroad, or

been taken out will not be permitted. 10 Am. & Eng. Enc. Law (2d ed.), p. 1158; 6 Am. & Eng. Enc. Law, p. 560; Sanitary Dist. v. Loughran, 160 Ill. 362, 43 N. E. 359; Searle v. Railroad Co., 33 Pa. 57; Port v. H. B. T. R. R. Co., 168 Pa. 19, 31 Atl. 950. This land has a special value as stone-producing land. The owners, therefore, are entitled to compensation according to its value as such. Sanitary Dist. v. Loughran, supra. It is like land with buildings thereon, or timber land, or lands having any other commodity which is a part of the land itself. It is not like annual crops, the profits of which are necessarily uncertain. While the profits or price or value of the minerals, if the minerals themselves are taken out, may not be considered, yet the value and extent and quality of the stone, or the buildings, or the timber, as the case may be, as is exercised upon the land may be considered. Lewis, Em. Dom. par. 486. If the extent and quality and value of the stone as it lie on the land may not be considered there would be no way by which the value of the land with the stone could be shown. All legitimate evidence tending to establish the value of the land with the mineral in it is permissible. The jury were not authorized by this instruction to fix the value of the stone apart from the land, but were instructed that they might consider the quantity of stone that could be gotten from the land, and the value thereof, or royalty thereon, as a guide in arriving at the value of the land. If a piece of land taken contains valuable improvements, those improvements apart from the land may not be considered; yet certainly the character, nature, and extent of the improvements, and the revenue derived therefrom, are as essential to be considered in arriving at the value of the land as the land itself or the uses to which it may be put. In Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206, the court said: So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future. In Dupuis v. Railway Co., 115 Ill. 97, 3 N. E. 720, the court said: The petitioners' fifth instruction in substance directed the jury that they should not take into consideration any profits, or supposed profits, realized from the business carried on upon such lands or lots, or the probable character of such business or profits in the future. Such profits are not proper elements in ascertaining the damages to which the defendants are entitled in this proceeding. This instruction was in our opinion, calculated to mislead the jury. It must be true that the profits or supposed profits arising from the business was not a proper element of damages, as declared in the instruction; but it will be observed that the instruction does not stop with profits or supposed profits, but goes further, and informs the jury that they should not take into consideration the character of the business transacted on the property. As said before, the main inquiry was the fair market value of the property to be taken, but in arriving at a solution of this question it was proper for the jury to consider the purposes for which the lands were used, whether they were adapted for that particular use, whether the lands were profitable and valuable for that use; and in so far as the particular use to which the lands were or had been appropriated, added to their market value, that might be considered by the jury. If the lands were valuable as located, bordering on or near the river, as it is contended they were, for a saw mill, planing mill, or factory of any description, or for any other

that the cost of insuring the buildings thereon, with their contents, will be necessarily increased by the building and operating of said road, and that the (rental) value of the premises will be decreased in consequence thereof, then these are facts proper to be considered by you in determining the question of damage and the amount thereof, as regards said premises.[33]

(b) The court instructs the jury that the law is that when a railroad condemns land for a right of way, the jury, in assessing damages, as shown by the evidence, to the owner, may take into consideration not only the value of the land taken but all the facts which contribute to produce the damages to that not taken, as, that the farm is put in a worse shape for cultivation or pasturage; that some portion of it is more dangerous for use; that there is danger of fire from passing engines, and all other inconveniences and damages the property may sustain in its use not only for the present but for the future.[34]

(c) If you believe, from the evidence, that in consequence of the building and operation of the railroad the property in question would be depreciated in value, whether from exposure to fire, inconvenience from trains or from danger to persons and property, then such matters will be proper to be taken into account by you in determining whether and to what extent the said ———— will be damaged by the construction of said road. The real question for the jury is whether, in consequence of the building and operation of the road, the property in question will be diminished in value.[35]

(d) The court instructs the jury that the element of danger by fire, if the jury believe there would necessarily be any increased danger from fire arising from the lawful operation of the contemplated road, or that the cost of insuring the buildings thereon would necessarily be increased by the building and operation of the

purpose, the testimony tending to prove such purpose was proper for the consideration of the jury in passing upon the fair market value of the property taken or damaged. See also Alloway v. Nashville, 88 Tenn. 510, 13 S. W. 123, 8 L. R. A. 123. If the jury are entitled to take into consideration the uses for which the property is suitable, they certainly have the right to consider whether the property is adapted to the particular uses claimed for it, and whether it is or is not profitable and valuable for such uses. Whether property is profitable and valuable for a particular use is always a controlling consideration in determining the value of the property itself. It follows that the quantity of stone that could be gotten from the land, and the value thereof, or the royalty thereon, are proper to be considered by the jury as a guide in determining the market value of the land." See also Lewis on Em. Domain (2d ed.), sec. 486.

33—Lafayette, etc., Rd. Co. v. Murdock et al., 68 Ind. 137; Swinney v. Ft. Wayne, etc., Rd. Co., 57 Ind. 205; Lewis on Em. Domain (2d ed.), sec. 497.

34—"This instruction is sustained by the views of this court as expressed in K. & E. R. R. Co. v. Henry, 79 Ill. 290; L. S. & M. S. Ry. Co. et al. v. C. & W. I. R. R. Co., 100 Ill. 21; C. R. I. & P. R. R. Co. v. Smith, 111 Ill. 363;" C. P. & St. L. R. R. Co. v. Blume, 137 Ill. 448 (452), 27 N. E. 601.

35—Blesch v. C. & N. W. R. R., 48 Wis. 168, 2 N. W. 113.

road and that the value of the premises would thereby be decreased, if proven, are proper elements for the consideration of the jury in arriving at a conclusion on the question of damages.[36]

§ 862. **Jury May Take Into Account the Fact that Lots are Susceptible of Extension.** The court instructs the jury that if you find, from the evidence in this case, that the lots in question or any of them are susceptible of enlargement and extension by filling, thus giving increased areas for any use to which the property may be put, then you have a right to take that into account in arriving at your verdict, and give such fact the weight which, in your judgment, it is entitled to receive, so far as the same affected their market value on the (date of filing petition).[37]

§ 863. **View of Premise by Jury—To be Governed by Testimony of Witnesses and from the Inspection.** (a) By order of the court, and with the consent of the parties, you went upon the premises, and viewed them, so that you might have a more intelligent understanding of the evidence from knowing the lay of the land and the location of the railroad over it; and you may and should use your own observation and judgment, together with all the other evidence in the case, as to the damage sustained, if any, and the advantages accruing, if any, as well. The opinions of witnesses are to aid and assist you, if possible, in arriving at a just conclusion; but you are not to lay aside your own observation and judgment, and accept the conclusions of witnesses if you think them extravagant in being either too high or too low or incorrect. It is entirely a question for the exercise of your best judgment, adapting the testimony of the witnesses to the land and to the location and construction of the road upon it, as you saw it, and also using your own judgment and knowledge in the matter.[38]

(b) The court further instructs the jury that if they believe, from the whole evidence, that they have, from personal examination of the premises, arrived at a more accurate judgment and determination as to the value of the premises sought to be taken, and of the amount of damages, if any, than is shown by the evidence in open court, then and in that case they may, upon the evidence, rightfully fix the value of land taken and the amount of damages, if any, over and above special benefits, if any, at the amount so approved by their judgment, so formed from personal examination of the premises as a jury, even though it may differ from the amount testified to, and from the weight of testimony given by witnesses in open court.[39]

36—Chi. & M. Electric R. R. Co. v. Diver et al., 213 Ill. 26 (33), 72 N. E. 758.

37—R. I. & P. Ry. Co. v. Leisy B. Co., 174 Ill. 547 (550), 51 N. E. 572.

38—Hoffman v. Bloomsburg & S. R. Co., 143 Pa. 503, 22 Atl. 823 (824).

39—Guyer v. D. R. I. & N. W. Co., 196 Ill. 370 (379-80), 63 N. E. 732.

"The instruction conforms to the law on this point as declared by this court in Kiernan v. C. S. Fe & C. Ry. Co., 122 Ill. 188, 14 N. E. 18;

(c) You were taken upon the ground, and had the opportunity to view and examine the premises yourselves. This was done in order that you might be aided in coming to a correct conclusion as to the contention between the parties. In ordinary cases the jury is to be governed by the testimony of the witnesses examined in their presence; and, while you have been qualified to give a true verdict according to the evidence, that evidence in this case consists of what you have seen on the ground, as well as the testimony of the witnesses who have been examined during the trial before you in court. What you observed on the view, then, you must remember as a part of the evidence in the case. The statements of the witnesses who have testified must be considered by you, yet you are not bound to be controlled thereby if your own examination of the premises leads you to a different conclusion.

(d) You are to judge of the amount of damages suffered by the plaintiff from the inspection you made of the premises, as well as from the opinions of others who have made an examination and gave you their opinions under oath. What you saw on the ground, therefore, and what you have heard from the witness stand, should be the basis of your conclusion.[40]

§ 864. Assessing Damages—Weight to be Given Testimony of Use of Adjoining Lots. The court instructs the jury that the evidence of the plans or intentions of the owners of lots 3 and 4 in question to construct a slip between said lots, or either of them, should not be considered by the jury to enhance or increase the damage of said owners by showing such construction of a slip or dock would be a profitable investment, but the jury should consider the evidence of such plans or intentions merely on the question as to what uses said lots might or might not be adapted, giving to such evidence such weight as the jury believe it is entitled to; and the court further instructs the jury that they must find the just compensation to be paid for each of said lots in its present condition separately.[41]

§ 865. Public Improvement—Damnum Absque Injuria—Must be a Direct Physical Disturbance. You are instructed that the owner cannot recover for every possible injury which is necessarily incident to the ownership of property in towns or cities, which directly impairs the value of private property. For instance, the building of a jail, police station, or the like, will generally cause direct depre-

C. G. Ry. Co. v. Murray, 174 Ill. 259, 51 N. E. 245." But see Dupont v. Sanitary District, 203 Ill. 170 (179), 67 N. E. 815, where an instruction was held erroneous which authorized the jury to disregard the testimony of a witness if upon their own inspection of the premises they believed he had not testified to the fair cash market value.

40—Gorgas v. Phil. H. & P. R. Co., 144 Pa. 1, 22 Atl. 715 (716).

41—C. R. Ry. Co. v. Moore et al., 124 Ill. 329 (336), 15 N. E. 764.

"The introduction of this plat for the purposes named, and limited by the Trial Judge at the time, in connection with the instruction given the jury in respect thereto, cannot, under the authority of C. & E. R. R. Co. v. Blake, 116 Ill.

ciation in value to the neighboring property, yet that is clearly a case of *damnum absque injuria.* So as to the obstruction in a public street; if it does not practically affect the use or enjoyment of neighboring property, and thereby impair its value, no action will lie. In all cases, to warrant a recovery, it must appear that there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained special damage with respect to his property in excess of that sustained by the public generally.[42]

§ 866. Railroad Right of Way Unfenced for Six Months—Proper for Consideration. (a) The court instructs the jury that under the statute the plaintiff company is not required to fence its road until six months after it had completed the same, and the damages, if any, attending the keeping open of the right of way during that time are proper for the consideration of the jury as an element of damage.[43]

(b) The court instructs the jury that under the law the railroad company is not required to fence its right of way until its railroad has been in actual operation, with trains running over it, for the term of six months, and it is proper for you to consider this fact in estimating the plaintiff's damages.[44]

163, 4 N. E. 448, be regarded as erroneous."

42—O. M. Ry. Co. v. McDermott, 25 Neb. 714, 41 N. W. 648-649.

"This language is quoted from the opinion in Gottschalk v. R. R. Co., 14 Neb. 550, 16 N. W. Rep. 475, and 17 N. W. Rep. 120, and which is there quoted from Rigney v. City of Chicago, 102 Ill. 64. While it appears that the reasoning in Rigney v. City of Chicago was adopted by this court in Gottschalk v. R. R. Co., and for the purposes of this examination it may be assumed that the instructions clearly state the law, but with more elaboration than necessary for the purpose of an instruction, yet we think that all the essential elements contained in it were presented to the jury in the instructions given by the court upon its own motion."

43—Chi. & Mil. E. R. R. Co. v. Diver et al., 213 Ill. 26 (32), 72 N. E. 758.

44—St. L. & S. Ry. Co. v. Smith, 216 Ill. 341, 74 N. E. 1063.

"Two complaints are urged to this instruction: First, that it would mislead the jury to believe that the appellant company was not required by the statute to fence its railroad right of way until six months after it had begun running its trains on its tracks; and second, that the instruction erroneously assumes that damages will necessarily result if the land not taken be left unfenced for six months. In Rockford, Rock Island and St. Louis Railroad Co. v. Heflin, 65 Ill. 366, we construed the statute requiring the right of way of railroads to be fenced, and held that the computation of the period of six months began when the company commenced to run its trains on the tracks for construction or other purposes. As to the second ground of complaint, it appeared from the evidence, without dispute, that the right of way extended to within seven feet of the front of appellee's dwelling, and that for that reason the dwelling and outhouses must be moved at great cost; and, moreover, that until the right of way should be fenced, the barn lot, the yard about the dwelling house of the appellees, their garden, pasture and all their fields, would be unprotected; that their own domestic animals could not be kept on their premises or the animals of other persons excluded. That damages would be occasioned

§ 867. Measure of Damages for Right of Way Through Farm Lands. The court instructs the jury that, in assessing the damages to the owner of the land, they are justified in taking into consideration not only the value of the land actually taken, but all the facts which contribute to produce damages to that not taken, as, if it appears from the evidence that the farm is cut in an inconvenient shape for cultivation or other farm purposes; or that the land is divided or cut off from the water, pastures or improvements, or that any spring, well or water supply is destroyed or cut off from the dwelling house; or that there is danger from killing or injuring stock, or damage from fire from passing engines; or that there will be inconvenience in crossing or recrossing the right of way and track in going from one part of the farm to another; the injury, if any, by reason of the field or farm being thrown open until the company fences the right of way, and all damages that are reasonably probable to flow from the construction and operation of the proposed road.[45]

§ 868. Riparian Owners—Exclusive Right to All Ice to Middle of the Stream—Right to Use Dock, etc. (a) The court instructs the jury that the owners severally of the lots fronting on the Illinois River and here sought to be condemned, own to the middle thread of the stream, subject only to the right of the public to use the navigable portions thereof for purposes of navigation. Such owners have also the exclusive right to any and all of the ice form-

to property not taken was indisputably proven and was an unquestioned fact. No injury could have been occasioned by the mere assumption of this undisputed fact."

45—C. P. & St. L. Ry. Co. v. Greiney, 137 Ill. 628 (632), 25 N. E. 798.

"The effect of the instruction is that the jury are to take into consideration all facts which contribute to produce damage to the land not taken as they appear from the evidence. That the facts recited are circumstances which may tend to deteriorate the value of a farm, and therefore contribute to produce damage to land not taken, we think can admit of no controversy. The recovery can only be for the depreciation in the market value of the land not taken, and the jury were expressly told in an instruction given at the instance of appellant that they were not authorized by law to allow anything by their verdict by reason of any supposed damage to stock from the use of said right of way for railroad purposes, or for damage to the person of the land-owner or any member of his family, or the damage to stock by reason of the taking and subsequent using of said right of way; that the law considers the probable damage to stock or to the family of the land-owner as too remote and speculative to be considered in estimating the just compensation to be paid for such right of way. A depreciation in the market value of the land is quite a different thing, and whether that is because of an inconvenient shape of fields, non-access from one part to another, caused by the building of the road, or from injuries anticipated to property from its operation, the result is the same, and is solely because of the building and operating of the road, and therefore to be compensated for by the appellant. The material inquiry is the fact of depreciation in market value, but it is within the province of the jury to enquire whether the facts thus recited exist, and if they exist, whether they cause a depreciation, and if any, its extent, in the market value."

ing in said river in front of their lots respectively, to the middle thread of the stream, and may themselves cut and remove the same, or sell such ice to another with the exclusive right to harvest it.

(b) The jury are further instructed that, as owners of lands fronting upon and bounded by a navigable stream, the defendants in this case, subject to the rights of the public in such navigable stream, own their several lots to the middle thread of said stream, and the said defendants, as such lot owners, have the right to use and enjoy their several lots by building docks and wharves thereon, or by filling in the same with earth or other solid matter to any extent whatever, so long as they do not interfere with the rights of navigation by the public in such stream.[46]

§ 869. Damages for Erosion of Shore Lands—Nominal Damages. With reference to the cause of action herein, in which the plaintiffs have claimed $—— damages for erosions and washing away of the banks of the lands described in the complaint, the court instructs you that the plaintiffs, in open court, announced that owing to the facts that they were unable to establish by competent proof the amount of damages, in dollars and cents, therefor, and that because of the difficulties and impossibilities of determining the exact damages in dollars and cents, they have waived their right to recover anything but a nominal sum for such damages. And you are instructed that as a matter of law, upon the evidence in this case, the plaintiffs can recover of the defendants only nominal damages, if any, for injury to their lands described in the complaint on account of erosions and the washing away of the banks of the plaintiff's lands above the line of mean high tide. And by "nominal damages" is meant some small sum, such as one dollar.[47]

§ 870. Appropriation of Streets—Right of Free Access to and Egress from Property. The court instructs the jury that as the owner of the lots and buildings in question, the said A. B. has a vested right of free access to and egress from the lots and buildings over and along P. street in front of the lots as the same are now located and used. That this is a right of property that cannot be materially improved or destroyed without his consent except upon payment to him of reasonable compensation therefor; and, therefore, if you believe, from the evidence, that the contemplated railroad will materially impair or injure the rights of ingress and egress in the transaction of business upon the premises in ques-

46—R. I. & P. Ry. Co. v. Leisy B. Co., 174 Ill. 547 (550), 51 N. E 572.

47—Lownsdale et ux. v. Gray's Harbor. B. Co., 36 Wash. 198, 78 Pac. 904 (906).

"It was not necessary for the court to state his reason to the jury for giving the instruction, but we think the statement did not amount to a comment upon the facts in the case, and that it could have had no prejudicial effect upon the defendant's case. If error at all, it was without prejudice."

tion, he is entitled to recover such damages as will compensate him for the injury.[48]

§ 871. **Change in Street Grade—General Benefits not to be Considered.** (a) The court instructs the jury that the natural surface of a street or highway of this city is the legal grade thereof until it is changed by ordinance. And the city had no right without the consent of the owner of the abutting property to change the grade of the street from the natural surface thereof if such change damages or injures the abutting property as hereinafter defined without paying or tendering the owner of such abutting property, the damages occasioned by such change or grade.

(b) You are instructed that in considering whether or not any special benefits were conferred upon plaintiff's property you cannot take into consideration such benefits, if any, as were conferred upon property generally in the locality of the grading or elsewher by reason of the fact, if it be a fact, that after said grading ——— avenue was a better street for travel generally by the public.

(c) If you find for plaintiff, the measure of damages in this case is the difference, if any, in the market value of the property owned by plaintiff, and mentioned in evidence, immediately before said grading was done and immediately after it was finished, as caused by the grading done in front of and abutting said property.[49]

§ 872. **Special Benefits Equal to or Greater Than Damages—Special Tax for Cost of Improvement not to be Considered.** (a) If the jury believe from the evidence that the property of the plaintiff was in any manner specially benefited by the grading of ——— avenue adjoining the same, and that the amount of said special benefits is equal to or greater than the damages, if any, done to said property by reason of said grading, then the plaintiff cannot recover and your verdict should be for the defendant.

(b) The jury are instructed that in weighing the evidence in this case and making up their verdict they should not give any consideration whatever to the fact that the cost of improving ——— Avenue was charged as a special tax against the adjoining property. The law assesses such cost against the adjoining property and the city is in no event liable to pay such tax, and the owner of the land so assessed is not entitled under the law to recover the same from the city either directly or indirectly.[50]

48—Blesch v. C. & N. W. Rd. Co., 48 Wis. 168, 2 N. W. 113, 31 Am. Rep. 306; Grand Rapids, etc., Rd. Co. v. Heisel, 38 Mich. 62; Cent. Branch. U. P. Rd. Co. v. Twine, 23 Kans. 585.

49—Widman Inv. Co. v. City of St. Joseph, 191 Mo. 459, 90 S. W. 763 (764); Lewis on Em. Domain (2d ed.), sec. 494.

50—Widman Inv. Co. v. City of St. Joseph, 191 Mo. 459, 90 S. W. 763 (764).

"The first instruction follows accurately the measure of damages given in Smith v. St. Joseph, 122 Mo. loc. cit. 647, 27 S. W. 344, and is in strict harmony with the law as to the measure of damages in such cases promulgated by this

§ 873. Damages to Adjoining Property by Change of Grade—Diminution of Market Value to Extent of Damage, Less Benefits. (a) The court instructs you that if you believe from the evidence that the city raised the level of Washington street, or caused it to be raised, for the laying of a pavement thereon, and that such raising of said street above its former level damaged the property of the plaintiff described in the declaration, and reduced its market value, then the plaintiff is entitled to recover the amount that his said property was so damaged, less the benefit, if any, which the evidence shows the property received from the making of the street improvement.

(b) The court instructs the jury that in case they should believe from the evidence the plaintiff had been in any way benefited by the improvement of the street in front of plaintiff's property in question, then in such estimate the jury should deduct from such benefit what they believe from the evidence plaintiff has paid and is liable to pay, toward making the pavement in front of said premises, and in any event it is only the difference between the benefits proved by the evidence and such payment, and liability to pay which can be set off against the damage to plaintiff property if plaintiff has proven any damage.

(c) The court instructs you that the measure of damages in this case, if any have been proven, is the difference in the market value of plaintiff's property before the level of the street was raised and its market value after the street was so raised.[51]

court in Hickman v. Kansas City, 120 Mo. 121, 25 S. W. 225, 23 L. R. A. 658, 41 Am. St. Rep. 684.

"The second instruction points out that the city cannot be made liable either directly or indirectly, and that to allow such costs to be deducted from the special benefits before the special benefits are deducted from the damages, would in effect make the city pay the cost of the grading, instead of requiring the abutting owner to do so as the law requires.

51—City of Bloomington v. Pollock, 38 Ill. App. 133, aff'd 141 Ill. 346, 31 N. E. 146.

Comment by the Appellate Court: "It will be seen that here are two different measures of damages, one the difference in market value before and after the street was raised, the other the damages caused to the property, less the benefits conferred, from which benefits should be deducted the cost to the owner of the improvement, the latter being the more favorable to the plaintiff.

"Is it sound and correct in principle?

"The case is one where plaintiff seeks the just compensation guaranteed by the constitution where private property has been damaged for public use. In respect to property not taken, but damaged merely, the compensation is the amount of the damage less the benefit conferred. Now should the benefit be considered without regard to the cost of it to the owner of the property? Manifestly he is not benefited the whole sum of benefit conferred, because he has been compelled to pay a certain amount by way of assessment in order to obtain whatever benefit is attributable to the improvement. It is the net benefit which should be deducted from the damage produced by the improvement, and the sum remaining will represent the just compensation which he will be entitled to. This will usually be more than the difference in market value. At least it is so theoretically in all cases, for it is presumable that the market value is diminished to the extent of the damage, less the benefit.

"We are of opinion no error was

§ 874. Financial Condition of Parties Immaterial. You are instructed that it is utterly immaterial whether the plaintiffs in this case are poor or rich men, or whether the defendant, the city of ———— is bankrupt or has its treasury full of funds. No facts of this character should be considered by you in any respect whatsoever in determining whether or not the plaintiff's property has been damaged by reason of the elevation and construction of the public work described in the declaration, and in the evidence in this case. If you should find, from the evidence, that the plaintiff's property has been damaged by reason of such work, then the plaintiffs are entitled to have a finding in this case against the defendant, whether the plaintiffs be rich or poor, or whether the city of Chicago be bankrupt or otherwise.[52]

§ 875. Telephone Line Construction—Unnecessary Trimming of Trees. You are instructed that if you believe from the evidence that there was unnecessary trimming and cutting of the branches, you must take into consideration in determining the amount of damages if any, therefor, the cutting and trimming of limbs which was necessary, for that the defendant had the right to do reasonably necessary trimming; and to the extent such trimming and cutting of branches was reasonably necessary, plaintiff is not entitled to damages, and you must separate and distinguish the damages suffered, if any, by unnecessary cutting from the injury by reason of the necessary trimming, so that you will not allow dam-

committed in this respect of which appellant may complain."

The Supreme Court, in affirming the judgment, after quoting the above comment by the Appellate Court, said:

"We concur in this statement of the law. Where an improvement is made in a street which works an injury to private property, then the measure of damages is the difference or depreciation in market value or, that which is the same thing, the damage less the benefit. (Springer v. City of Chicago, 135 Ill. 552, 26 N. E. 514, and authorities there cited.) But where the improvement so made is paid for, in part, by the owner of the property injured, by way of special taxation, then another element necessarily enters into the computation of the damages to be assessed in favor of such owner, for unless the amount paid in order to secure the benefits set off against damage is taken into consideration and deducted from benefits, by exactly that amount the damages recovered will fall short of being just compensation."

The third instruction given above, seems, from the comment of the courts, to be correct in form but not applicable to the facts in the case.

52—City of Chicago v. Spoor, 91 Ill. App. 472 (474), 190 Ill. 340, 60 N. E. 540.

"It is said that there was error in the giving of appellee's instruction, which is quoted above, because there was no proof that the appellees were poor or rich men, or that the city of ——— was bankrupt or otherwise. The evidence tends to show that the appellees were rich men, but the instruction was given no doubt because of the statement of appellant's counsel to the court that he attempted to prove in cross-examination of the appellee ——— that the appellee X was a director in a corporation, that plaintiff's counsel had gone into the pedigree of ———, and that he ought to be permitted to go into the pedigree of his joint owner, and to show his relation in business up to that time by cross-examination, to which the court replied that it was immaterial in this court whether Mr. X is a millionaire or the meanest pau-

ages, if any, caused by the cutting which was reasonably necessary to be done in the construction of the telephone system.[53]

§ 876. **Where Part Only Condemned, Any Benefits to Remainder Not Considered—Diminished Value Considered.** (a) In assessing the compensation to be made to the owners of the land the jury should assess the value of the land taken at what they believe, from the evidence, it is worth, irrespective of any benefits which may or may not accrue to the remainder of the tract—and also any damage which the jury believe, from the evidence, will result to the owner by reason of the diminished value of the remainder of the tract, if anything, in consequence of the appropriation of the land taken (over and above special benefits when proper).

(b) In ascertaining these amounts you are to take into consideration not only the purposes to which the land is or has been applied but any other beneficial purpose to which the jury can see from the evidence it might reasonably be applied, and which would affect the amount of compensation or damages.[54]

§ 877. **Remote Contingencies—Where Part Only Taken—Whole Tract to Be Considered.** (a) In determining the amount to be allowed to plaintiff for the (——) acres of land taken by the defendant, you are to find from evidence what was its fair market value at the time it was taken. By this is not meant what the strip of land taken for the right of way, by itself, would be worth, in the market, but, as a part of the piece of land owned by the plaintiff, and of which it formed a part, what would be the fair market value per acre for such land, and allow the plaintiff at such rate for the 2.05 acres.

(b) You are instructed that you should not take as a separate and distinct basis for the assessment of damages such remote contingencies as frightening of horses, liability of fires, and danger to persons or property from passing trains. Such contingencies are only to be considered for the purpose of determining whether, and to what extent, the value of the property will be decreased by the building and operation of the railroad. If, in consequence of its exposure to such dangers, the actual value of the property will be diminished to any extent, then such decrease in value measures the actual loss to the owner, in so far as the damages done to his land not taken by the railroad is concerned.

per in America. It is well and generally known that the city of C. has control of great wealth, and no evidence in that regard was necessary. We think there was no reversible error in this instruction."

53—Meyer v. Standard Telephone Co., 122 Ia. 514, 98 N. W. 300.

"The true rule was expressed in the instruction asked. The difference in the value of the land after defendant had trimmed and cut, as it was entitled to do under the law, and the value of the land after the unauthorized cutting was the true measure of recovery. Disbrow v. Winchester, 164 N. Y. 415, 58 N. E. 519; Penn. Coal Co. v. Sanderson, 113 Pa. 126, 6 Atl. 453, 57 Am. Rep. 445."

54—Railway Co. v. Longworth, 30 Ohio St. 108; Lewis on Em. Domain (2d ed.), sec. 496.

(c) You are instructed that the evidence establishes the fact that the plaintiff is the owner of a piece of land of about 21 acres in a body, and in considering the question of the damage done to the land not taken, if you find from the evidence that the entire tract, taken as a whole, was damaged, then you should allow for such damage. Evidence has been introduced tending to show what effect the location of the defendant's road would have upon the plaintiff's land for division into town or suburban lots and sale for such purposes. This evidence was admitted to aid you in finding the real and actual fair market value of the plaintiff's land for any use or purpose which you may find from the evidence the land was reasonably adapted for. You are not allowed to fix any speculative value upon the plaintiff's land, based upon what the same might in the future be worth, but to find from the evidence and your own observation what the land before and after the location of the defendant's road was fairly worth in the market as it was at said times.[55]

§ 878. **Part Condemned—Remainder Cut Into Irregular Fields—What to Include and Exclude.** If you believe, from the evidence, that the lands of the claimant adjoining the proposed railroad track, will be less valuable because of their exposure to fire, or for the reason that the railroad will cut the lands into irregular fields, or will render access to the different portions of the lands more inconvenient or dangerous, then, these are all matters which may be taken into account by you in estimating the claimant's damages. You are not to fix any definite estimate of the amount of damages arising from these several sources. The true question to be determined is, what is the market value of the property as a whole, without the railroad, and what will be its market value after the road is built and in operation, making no allowance for any general benefits which the property may derive from the building of the road, and which it will share in common with the other property generally in the vicinity. The value of the property taken and the depreciation in the market value of the remainder, if any, is the compensation to which claimant is entitled.[56]

§ 879. **Value of Land Taken—Depreciation of Remainder Proper Element to Consider.** If you believe, from the evidence, that the property in question is city property, and mainly valuable to be built up and occupied as a residence, or for building purposes, and that it is in such close proximity to the proposed railroad that the jar caused by the moving trains will affect the buildings standing thereon, or the noise, smoke or increased danger caused by the use of the railroad, will depreciate the market value of the property, then such matters are proper to be considered by you in estimating

55—O. S. Ry. Co. v. Beeson, 36 Neb. 361, 54 N. W. 557 (559).

56—Utica R. R. Co. in re, 56 Barb. (N. Y.) 456; Snyder v. Railroad Co., 25 Wis. 60.

the amount of compensation to which the plaintiff is entitled. You are not to fix any definite estimate of the amount of damages arising from the several sources. The real question to be determined, is, what is the market value of the property as a whole without the railroad, and what will be the market value of the remainder after the road is built and in operation, making no allowance for any general benefits which the property may derive from the building of the road and which it will share in common with other property generally, in the vicinity. The value of the property taken and the depreciation, if any, in the market value of the remainder, added together constitute the compensation to which the claimant is entitled in this proceeding.[57]

§ 880. **Plaintiff Entitled to Recover for Any Depreciation in Market Value of His Lands—Lands Taken and Lands Not Taken.** If the jury believe, from the evidence, that plaintiff is the owner in fee simple of the land described in the declaration, and that the defendant railroad company, in constructing its road-bed and track, entered upon any portion of plaintiff's said land, and dug up and carried away the soil, and that such acts were a physical injury to such lands, or any part thereof; and if the jury further believe, from the evidence, the construction of defendant's road-bed and track along, near and adjacent to plaintiff's land, and its contemplated maintenance and operation (if the jury believe, from the evidence, they are so constructed, and that defendant intends to maintain and operate the same), are an actual damage to his lands, and do in fact render the same less valuable in the market if offered for sale,—then the law is for plaintiff and the jury should find for him. And the jury are instructed as a matter of law, plaintiff is entitled to recover for any depreciation (if the jury believe from the evidence, there has been any depreciation) in the market value of plaintiff's lands not actually entered upon, by reason of the construction, maintenance and operation by defendant of its railroad as constructed, and also for any physical injuries done to that portion of plaintiff's land upon which defendant did actually enter (if the jury believe, from the evidence, defendant did enter upon any portion of the plaintiff's lands described in the declaration, and did cause any physical injuries to the same).[58]

§ 881. **All Facts as Well as Stipulations Must be Considered.** You are further instructed that if in this case you believe that any witnesses who have testified to damages to adjacent land have not based their evidence upon such additional requirements and stipulations, then and in that case you should disregard such evidence in so far as it has failed to be based upon such special stipulations.[59]

57—In re N. Y. C. R. R., 15 Hun (N. Y.) 63; Chicago, etc., R. Co. v. Hall, 90 Ill. 42.

58—L. E. & W. R. R. Co. v. Scott, 132 Ill. 429 (433), 24 N. E. 78, 8 L. R. A. 330.

59—Prather v. Chicago So. R. R. Co., 221 Ill. 180 (199, 200), 77 N. E. 430.

"Objection is made to this clause that it invaded the province of the jury, in that it instructed them that no weight should be given to the testimony of any witnesses who, in estimating appellant's damages, did not base such estimate upon the stipulations. That stipulations had been entered into and were filed in the case was not a disputed fact, and was one of the circumstances that should have been considered by the witnesses in arriving at their opinions as to the amount of damages sustained by the appellant. The instruction merely stated that if a witness had not based his opinion on all of the facts affecting the damages, then his testimony should be disregarded to that extent. The instruction did not invade the province of the jury by telling them that credibility or weight should be given to the testimony of any particular witness or witnesses, but was an instruction to them not to consider certain evidence which was incompetent, not being based upon the facts in the case."

CHAPTER XLIII.

DAMAGES, MEASURE OF—PERSONAL INJURY.

See Erroneous Instructions, same chapter head, Vol. III.

§ 911. Should consider age and condition in life—Mortality tables—Sound judgment and discretion of jury—Only compensatory damages.

§ 912. Shortening of life not an element of damage, but may be considered in determining extent of injury.

§ 913. What jury may consider in assessing damages—Standard life and annuity tables competent evidence to assist jury.

§ 914. Plaintiff suffering from disease at time of injury—Hastening development of disease.

§ 915. Injury attributable to a diseased condition in whole or part.

§ 916. If injured was in bad health before the fall in the street, recovery can only be had for aggravated injuries occasioned by such fall.

§ 917. Injuries aggravating former diseased condition.

§ 918. Past and future mental suffering on account of disfigurement of person—Element of damage.

§ 919. Pain and anguish of body and mind—Eyesight or hearing impaired, etc.

§ 920. Ears impaired—Object of ridicule—Rule of damages.

§ 921. Damages for mental suffering apart from physical injury.

§ 922. Should consider whether injury is permanent, etc.

§ 923. Should determine whether injury is permanent or temporary—Consider all the evidence with respect to injury to person and property—Mental anguish, etc.—Pecuniary point of view.

§ 924. Permanency of maladies—Damages restricted by evidence in the case.

§ 925. To take into consideration all the facts and circumstances as detailed in evidence—Permanency of bodily injuries.

§ 926. Future mental and bodily suffering allowable — Rule when injury is permanent.

§ 927. Whether certain ailments resulted from injuries.

§ 928. Care to be taken by injured person after injury.

§ 929. Failure to use due care in treating injury.

§ 930. Defendant not liable for aggravated injuries occasioned by carelessness of injured after accident—Should seek proper medical attention.

§ 931. Injured must use care in selecting doctor but not insurer of doctor's skill.

§ 932. Physician's services and medicines — Negligence in treatment of wound.

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§ 935. What the jury may think right and proper in view of all the facts and circumstances proved.

§ 936. Damages for personal injury in sound discretion of jury—From all the facts in the case, etc.

§ 937. Jury may estimate damages from facts and circumstances in proof, in connection with their knowledge, observation and experience in business affairs of life—Limitation of the rule.

§ 938. Injury to postal clerk—Compensation from other sources will not release or diminish amount defendant is liable for.

§ 939. Measure of damages limited to what is alleged and proved, and what results from accident.

§ 940. Omitting element of damages in an instruction not error, if instruction otherwise correct—Omission should be corrected by special charge.

§ 941. Compensatory damages only.

§ 942. Exemplary damages—In tort generally.

§ 943. Punitive damages — Actual damages very small.

§ 944. Negligence may be so gross and reckless as to imply intent—For purpose of allowing punitive damages.

§ 945. Punitive damages — Smart money.

§ 946. Illness caused by poisonous gases from excavations—Damages.

§ 947. Plea of compromise and settlement.

§ 948. Action by husband for injuries to wife—Pain and suffering of wife.

§ 882. What May be Considered in Assessing Damages. (a) If you find, from the evidence, that the plaintiff is entitled to recover as alleged in his declaration, then in estimating the plaintiff's damages, you may take into consideration his health and physical condition prior to the injury, and also his health and physical condition since then, if you believe, from the evidence, that his health and physical condition since then is impaired as the result of such injury; and you may also consider whether or not he has been permanently injured and to what extent, and also to what extent, if any, he has been injured, and to what extent, if any, he may have endured physical and mental suffering as a natural and inevitable result of such injury, and also any necessary expense he may have been put to in and about caring for and curing himself, and the value of any time you may believe, from the evidence, he has lost on account of such injuries, and you may consider what, if any, effect such injuries may have upon him in the future in respect to pain and suffering or respect to his power to earn money by his labor; and you should allow to him as damages such sum as, in the exercise of a sound discretion, you may believe from all the facts and circumstances in evi-

dence will be a fair and just compensation to him for the injuries so sustained.[1]

(b) If you find for the plaintiff in this case, then, in determining the amount of damages the plaintiff is entitled to recover, if any, you should take into consideration all the facts and circumstances in evidence before you, the nature and extent of the plaintiff's injuries, if any, her pain and suffering resulting from such injuries, if any, and also such future or prospective pain and suffering and loss of health and strength, if any, which she has sustained, or will sustain in the future, by reason of such injuries, and also such sum or sums as plaintiff has become liable for, if any, for nursing and medical service because of said injury, and give her such sum as in your judgment, under all the evidence, will compensate her.[2]

(c) If you find for the plaintiff, then, in estimating his damages, you may take into consideration the nature and extent of his injuries, whether the same are permanent or temporary; you may also take into consideration any mental or physical pain which he has suffered, as shown by the evidence; any loss of time, loss of wages, or employment; also any expenses incurred for medical and surgical attendance or for nursing; and from all the surrounding facts, as shown by the evidence you will give him such damages as will compensate him for the injuries he has sustained, not, however, exceeding the amount named in the complaint.[3]

(d) If the jury find for the plaintiff, in estimating and determining the measure of his damages they should take into consideration, in connection with all the facts and circumstances in evidence, the bodily pain and suffering and mental anguish, if any, endured by him, and resulting from the injuries received; the character and extent of his injuries, and whether they are permanent in their nature; the extent, if any, to which he has been prevented and disabled by reason of such injuries from working and earning a livelihood for himself; his necessary expenses for medical attention in endeavoring to be cured; and may find for him in such sum as, in the judgment of the jury, under all the evidence in the case, will compensate him for the injuries received, not, however, exceeding the sum of twenty thousand dollars.[4]

(e) The court instructs the jury that if you find for the plaintiff

1—I. C. R. R. Co. v. Cole, 165 Ill. 334 (337), aff'g 62 Ill. App. 480, 46 N. E. 275.

2—S. Con. Ry. Co. v. Puntenney, 200 Ill. 9 (14-15), aff'g 101 Ill. App. 95, 65 N. E. 442.

"This instruction states the rule with substantial accuracy and confines such damages to such sum as would compensate her."

3—C. St. Ry. Co. v. Hoffbauer, 23 Ind. App. 614, 56 N. E. 54 (58).

"An instruction to the jury cannot assume the truth of facts in issue between the parties. But the above instruction is not open to this objection. Taking the instruction as a whole, we do not see how any juror of average intelligence could fail to understand that he was required to be guided by the evidence. City of Ind. v Scott, 72 Ind. 196; Louisville N. A & C. R. Co. v. Falvey, 104 Ind. 403 3 N. E. 389 and 4 N. E. 908."

4—Merrielees v. W. R. Co., 16: Mo. 470, 63 S. W. 718 (721).

you will be required to determine the amount of his damage. In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to, and they should, take into consideration all the facts and circumstances as proven by the evidence before them, the nature and extent of plaintiff's physical injuries, if any, so far as the same are shown by the evidence to be the direct result of the injury, his suffering in mind and body, if any, resulting from such physical injuries, and such future suffering and loss of health, if any, as the jury may believe from the evidence before them in this case he has sustained or will sustain by reason of such injuries, his loss of time and inability to work, if any, on account of such injuries, and may find for him such sum as in the judgment of the jury under the evidence and instructions of the court in this case will be a fair compensation for the injuries he has sustained or will sustain, if any, so far as such damage and injuries, if any, are claimed and alleged in the declaration and proven, and it is not necessary for any witness to express an opinion as to the amount of such damages.[5]

(f) The court instructs the jury that if you find for the plaintiff you will be required to determine the amount of her damages. In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to, and they should, take into consideration all the facts and circumstances as proven by the evidence before them; the nature and extent of plaintiff's physical injuries resulting from the street collision in question if any, so far as the same are shown by the evidence; her suffering in body and mind, if any, resulting from such physical injuries, and such future suffering and loss of health, if any, as the jury may believe, from the evidence before them in this case, she has sustained or will sustain by reason of such injuries; her loss of time and inability to work, if any, on account of such injuries; and may find for her such sum as in the judgment of the jury, under the evidence and instructions of the court in this case, will be a fair compensation for the injuries she has sustained or will sustain, if any, so far as such damages and injuries, if any, are claimed and alleged in the declaration.[6]

(g) If from the preponderance of the evidence and under the instructions of the court, the jury find the defendant guilty, then in assessing the plaintiff's damages, if any, shown by the evidence, the jury should take into consideration the extent and nature of the in-

5—W. C. St. R. R. Co. v. Dougherty, 110 Ill. App. 204 (208-9).

"This instruction has been before the Supreme Court and passed muster, C. B. Q. R. R. Co. v. Martin, 111 Ill. 232; W. C. St. R. R. Co. v. Johnson, 180 Ill. 287, 54 N. E. 334; W. C. St. R. R. Co. v. Carr, 170 Ill. 478, 48 N. E. 992; C. St. Ry. Co. v. Brown, 193 Ill. 274, 61 N. E. 1093; S. C. St. Ry. Co. v. Puntenney, 200 Ill. 9, 65 N. E. 442; C. T. T. R. R. Co. v. Gruse, 200 Ill. 195, 65 N. E. 693. In the Brown case, supra, the court says: 'This instruction, substantially, has been before this court a number of times, and we do not regard the giving of it as error.'"

6—C. & M. E. R. Co. v. Ullrich, 213 Ill. 170 (171), 72 N. E. 815.

jury, if any, shown by the evidence, suffered by her as a direct and natural result of the accident in question, as shown by the evidence, the pain and suffering, if any shown by the evidence, present and future, which the jury may believe, from the evidence, the plaintiff has sustained or will sustain as a direct and natural result and consequence of such injury, the duration of such injury, and any permanent disabilities caused the plaintiff as a direct and natural result and consequence of such injury, if any, shown by the evidence; also any loss of health or strength, if any, which the jury may believe, from the evidence, the plaintiff has sustained as a direct and natural result and consequence of such injury, if any, shown by the evidence, and in general all such damages alleged in the declaration as the plaintiff has sustained, if any, shown by the evidence, as a direct and natural result of the injury, so far as any of the above mentioned elements of damage, if any, may have been shown by a preponderance of the evidence; and thereby the jury will determine what sum will be a fair and just compensation for such injury.[7]

(h) You have the right to give damages for that mental suffering which a man may have from the consciousness that his earning capacity is injured for life. That is one element of damage. Upon the question of damages, I charge you that there are several elements of damages which may be considered, and you will find the evidence in the case. If you find there are permanent injuries, you have the right to give damages for that as a distinct item. If you find there was physical pain and suffering, you have the right to give damages for that as a distinct item. If you find there was mental suffering, you have the right to give damages for that as a distinct item. You have the right to give damages for that mental suffering which a man may have from the consciousness that his earning capacity is injured for life. That is one element of damages. The fact that a man is not able to work, or may be damaged for life, is a matter that the jury may take into consideration. You can give damages for diminution of earning capacity, if the evidence justifies you to find that his earning capacity has been diminished, and that defendant is liable therefor.[8]

(i) The jury are instructed that if, under the evidence and under the instructions of the court, they find the defendant guilty as al-

7—N. Chi. St. R. R. Co. v. Hutchinson, 92 Ill. App. 567, aff'd. in 191 Ill. 104, 60 N. E. 850.

"The objection is urged to this instruction that it is broad enough to allow damages for future mental suffering. The word 'mental' is not mentioned in the instruction, and the instruction is not obnoxious to the criticism of counsel. The jury by the instruction were limited in the assessment of damages to the consideration of such pain and suffering as the plaintiff had sustained or might sustain as the direct and natural result and consequence of such injury. An instruction substantially similar as to past suffering except that it contained the word 'mentally' was approved in I. C. R. R. Co. v. Cole, 165 Ill. 334, 46 N. E. 275."

8—B. E. L. & P. Co. v. Simonshon, 107 Ga. 70, 32 S. E. 902; At. St. R. R. Co. v. Jacobs, 88 Ga. 647, 15 S. E. 825.

leged in the declaration, then, in estimating or assessing the plaintiff's damages, the jury should take into consideration the personal injury sustained by the plaintiff, if any is proven, in consequence of the accident in question; also the pain and suffering undergone by him in consequence of his injuries, if any are proved, and any permanent injury sustained by the plaintiff, if the jury believe, from the evidence, that the plaintiff has sustained such permanent injury in consequence of the accident in question, and such damages, if any, present or future, which the jury believe, from the evidence, are proven to be the necessary result of the injury.[9]

§ 883. **Same Subject, Continued.** (a) The court instructs the jury that if you find for the plaintiff, you will be required to determine the amount of her damages. In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to, and they should, take into consideration all the facts and circumstances as proven by the evidence before them; the nature and extent of plaintiff's physical injuries, if any, so far as the same are shown by the evidence; her suffering in body and mind, if any, as the jury may believe, from the evidence before them in this case, she has sustained or will sustain by reason of such injuries; her loss of time and inability to work, if any, on account of such injuries; all moneys necessarily expended or become liable, for doctor's bills, if any, while being treated for such injuries; and may find for her such sums as in the judgment of the jury, under the evidence and instructions of the court in this case, will be a fair compensation for the injuries she has sustained or will sustain, if any, so far as such damages and injuries, if any, are claimed and alleged in the declaration.[10]

(b) The court instructs the jury that, if you find the issues for the plaintiff, you will, in estimating her damages, take into consideration the character and extent of her injuries, the mental and physical pain and suffering endured by her in consequence of such injuries, and their permanency, if by the evidence shown to be permanent, and any amounts shown by the evidence to have been expended by her or contracted by her for medical and surgical attention this item not to exceed ..... dollars, and you may find for her in such sums as, under the evidence, will be a reasonable com-

9—L. S. & M. So. Ry. Co. v. Hundt, 140 Ill. 525 (530), 30 N. E. 458.

"While the instruction is not to be commended as a model, we think it improbable that the jury could have understood the last clause otherwise than as stating the general rule applicable to all damages as well as those arising from the injuries previously alluded to as those arising from any other source for which a recovery might be had in this case; and, understanding that clause in that sense, the instruction is not seriously objectionable, and the jury could not have been misled by it."

10—Cicero St. R. R. Co. v. Brown, 193 Ill. 274 (275-6), 61 N. E. 1093, aff'g 89 Ill. App. 318.

"This instruction substantially has been before this court a number of times, and has uniformly been approved, and we do not regard the giving of it as error, H.

pensation for the injuries shown by the evidence to have been sustained by her; in all, not to exceed the sum of ..... dollars.[11]

(c) The court instructs the jury that if you find for plaintiff you will be required to determine the amount of his damages. In determining the amount of damages plaintiff is entitled to recover in this case, if any, the jury have a right to and they should take into consideration all the facts and circumstances as shown by the evidence before them pertaining to his injuries; the nature and extent of the plaintiff's physical injuries, if any, so far as the same are shown by the evidence; his suffering in body and in mind, if any, resulting from such physical injuries, and such future suffering and loss of health, if any, as the jury may believe from the evidence before them in this case he has sustained or will sustain by reason of such injuries; his loss of time and inability to work, if any, which the jury may believe from the evidence he will sustain on account of said injuries; all moneys necessarily liable for doctors' bills, if any, while being treated for such injuries; and may find for him such sum as in the judgment of the jury from the evidence and under the instructions of the court in this case, will be a fair compensation for the injuries he has sustained, or will sustain, if any, so far as such damages are claimed by and alleged in the declaration.[12]

(d) If the jury believe, from the evidence, under the instruction of the court, that the plaintiff is entitled to recover, then, in fixing the damages which he ought to recover, the jury should take into consideration all the circumstances surrounding the case, so far as these are shown by the evidence, such as the circumstances attending the injury; the loss of time of the plaintiff, if any, occasioned by the injury; the pain he has suffered, if any; the money he has expended, if any, to be cured of such injury; the business he was engaged in, if any, at the time he was injured, and the extent and duration of the injury, and give the plaintiff such damages as the jury believe, from the evidence, he has sustained.[13]

(e) In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to, and they should, take into consideration all the facts and circumstances in evidence before them; the nature and extent of the plaintiff's physical injuries, if any, testified about by the witnesses in this case; her suffering in body and mind, if any, resulting from such injuries; and also such prospective suffering and loss of health, if any, as the jury may believe, from all the evidence before them in this case, she has sustained or will sustain by reason of such injuries.[14]

& St. Jos. R. R. Co. v. Martin, 111 Ill. 219; Chi. C. Ry. Co. v. Taylor, 170 Ill. 48, 48 N. E. 831; W. Chi. St. R. R. Co. v. Johnson, 180 Ill. 285, 54 N. E. 334."

11—Ashby v. Elsberry & N. H. G. R. Co., 111 Mo. App. 79, 85 S. W. 957 (959).

12—Approved in Chi. U. T. Co. v. Browdy, 108 Ill. App. 177.

13—Sedg. Dam., 618; C. R. I. & P. Rd. Co. v. Otto, 52 Ill. 416; Little v. Tingle, 26 Ind. 168; 1 Sutherland Damages, (3d Ed.) §§ 93-96, 3 Id. (3d Ed.) §§ 936-944.

14—H. & St. J. R. R. Co. v. Mar-

§ 884. **All Damage, Present, or Future, Which Is the Necessary Result of Injury.** (a) If, under the evidence and instructions of the court, the jury find the defendant guilty, then, in estimating the plaintiff's damages, it will be proper for the jury to consider the effect of the injury in future upon the plaintiff's health, if they believe, from the evidence, that his future health will be affected by the injury in question; and also the use of his hand, and his ability to attend to his affairs generally, in pursuing his ordinary trade or calling, if the evidence shows that these will be affected in the future; and also the bodily pain and suffering, the necessary expenses of nursing and medical care and attendance, and loss of time, so far as these are shown by the evidence; and all damages, present or future, which, from the evidence, can be treated as the necessary result of the injury complained of.[15]

(b) You should allow, not only for damages already past, but for all damages which would naturally and reasonably result from the injury, whether in the past or in the future.[16]

(c) If the jury find for the plaintiff, in estimating his damages they will take into consideration, not only his age, the physical injury inflicted, and the bodily pain and mental anguish endured, together with the loss of time occasioned, but also any and all such damages which it appears from the evidence will reasonably result to him from said injuries in the future.[17]

(d) You will allow him for all damages which naturally and directly result from his injuries, whether or not in the past or in the future.[18]

§ 885. **Reasonable and Just Compensation, Based upon the Evidence.** (a) You will find for the plaintiff such damages as you may believe from the evidence will be a reasonable and just compensation for the injuries so received, and resulting by reason of such negligence, if any.[19]

tin, 111 Ill. 227; C. B. & Q. R. R. v. Warner, 108 Ill. 545.

15—I. C. Rd. Co. v. Reed, 37 Ill. 484; Whalen v. St. L., etc., Rd. Co., 60 Mo. 323.

16—City of Lexington v. Flehartv, — Neb. —, 104 N. W. 1056 (1058).

"Complaint is made of the instruction, because it is alleged that the testimony was that if the plaintiff wore a truss that would fit and kept it adjusted, no danger or inability to work would result from the injury. It is true that in the testimony of the two physicians they gave it as their opinion that a truss properly fitted and kept adjusted would avoid any inability to work; but one of these physicians fitted the truss, which the plaintiff wore on account of a rupture which he claims to have sustained by reason of the injury complained of and the plaintiff's testimony was to the effect that after he had sustained the injury, and while wearing the truss, if he undertook to perform manual labor, such labor would cause pain near the injured part, and he would be obliged to desist and rest. But pain would follow any exertion on his part, and in our view of the case, it would certainly have been erroneous not to have submitted the question to the jury suggested by the instruction complained of."

17—Copeland v. W. R. Co., 175 Mo. 650, 75 S. W. 106 (109).

18—City of So. Omaha v. Sutliffe, 72 Neb. 746, 101 N. W. 997 (999).

19—R. R. T. & S. Ry Co. v.

(b) The court instructs the jury that if you believe from the evidence that the plaintiff has made out the charge of negligence as alleged in the declaration by a preponderance of the evidence, you should find the defendant guilty, and assess the plaintiff's damages at such sum as, under the evidence, will fairly compensate her for the injury sustained, provided you also find from the evidence that the plaintiff was in the exercise of ordinary care at the time she received the injury.[20]

(c) The jury are instructed, that a party suing for an injury received can only recover such damages as naturally flow from, and are the immediate result of, the act complained of. The jury should be governed solely by the evidence introduced before them, and they have no right to indulge in conjectures and speculations not supported by the evidence.[21]

§ 886. Sympathy Should Not Have Any Consideration in Assessing Damages—Same Position as if No Injury Had Taken Place. (a) The jury are instructed by the court that the measure of their damages, if they prevail on the questions to which I have called your attention, is compensation. Beyond that you must not go. Considerations of sympathy ought to find no place in your minds. How much will it take to put this father and the son, so far as money can do so, in the same position as that which they would have occupied if this accident had not taken place? That is a question which you must answer in determining the amount of damages that you will give them, supposing you find that F's accident was brought about by the carelessness of the defendant's servant, without being contributed to by any carelessness on his own part.[22]

(b) If you shall resolve the question submitted in the preceding instruction in favor of the plaintiff, you will then inquire as to the extent of the damages, if any, suffered by the plaintiff by reason of the injuries complained of. In considering the question of plaintiff's damages, in case you shall find he is entitled to damages, you may consider the extent of his physical injuries, the amount of disability occasioned thereby, the effect which such injuries have produced, and will in the future produce, upon his ability to earn his living by the practice of his profession or otherwise; the physical and mental pain and suffering, if any, which he has endured by reason of his injuries, and the pecuniary loss he has sustained by reason of the loss of time occasioned by his injuries. But you should not permit any consideration of sympathy for the plaintiff, or of economy for the defendant, to influence your verdict.[23]

Reynolds. — Tex. Civ. App. —, 85 S. W. 1169.

20—C. & A. R. R. Co. v. Buckmaster, 74 Ill. App. 575 (579).

"This instruction is substantially approved in I. C. R. R. Co. v. Gilbert, 157 Ill. 354, 41 N. E. 724; and in Wabash R. Co. v. Smith, 162 Ill. 583, 44 N. E. 856."

21—I. B. & W. Rd. Co. v. Birney, 71 Ill. 391.

22—Foote v. Am. P. Co., 201 Pa. 510, 51 Atl. 364.

23—City of Omaha v. Ayer, 32 Neb. 375, 49 N. W. 445 (447).

§ 887. **Occupation, Habits of Industry, Health, and Prospects of Life, etc., to be Considered.** If you find the plaintiff is entitled to damages, in estimating the sum you may take into consideration his occupation, habits of industry, health, and prospects of life, at the time he received the injury, governed by ordinary human knowledge and experience as to the age he would likely have remained capable of labor; also, the expenses incurred by him for medical attendance, nursing, loss of time, incapacity for labor after the injury, and pain and suffering sustained by him consequent upon such injury, if, in your judgment, the same is warranted by the evidence. You should look to the nature and extent of the injury inflicted, and then determine from the evidence what is just and proper under all the circumstances in evidence.[24]

§ 888. **Ability to Play Musical Instruments and Sing.** In arriving at a verdict in this case, if you find that the plaintiff sustained any injuries whatever through any negligence of the defendant or its employe, you must take into consideration the physical and mental condition of plaintiff before the occurrence of the accident, her accomplishments, if any, her ability to play musical instruments and sing.

The jury are further charged to take into consideration the effect, if any, of the accident to her upon her ability to play upon musical instruments and sing.[25]

§ 889. **Loss of Earnings in Business—Training Race-Horses.** If the jury find for the plaintiff they should assess his damage at such sum as they believe from the evidence will be a fair compensation to him, subject to the limitations of the other instructions given herein: First. For any pain of body or mind which the plaintiff has suffered or will suffer by reason of his injuries, and directly caused thereby. Second. For any loss of earnings from his business, directly caused by his disability to attend to his business, which the plaintiff has or will hereafter have sustained, directly caused by his injuries. Third. For any expenses for medicine, nursing, medical or surgical attention which the plaintiff has necessarily incurred, or will hereafter necessarily incur, directly caused by the said injuries, in seeking relief therefrom.[26]

24—Todd v. Danner, 17 Ind. App. 368, 46 N. E. 829.

25—Doolin v. Omnibus C. Co., 140 Cal. 369, 73 Pac. 1060.

"The case in principle is identical with that of Cons. Kansas C. Co. v. Tinchert, 2 Am. Neg. Rep. 534, where it is said: 'For the purpose of showing the extent and character of an injury, it was competent for the plaintiff to show that he was a musician prior to the accident, and that by reason of the injuries inflicted upon him he was afterwards unable to blow the wind instrument he had been in the habit theretofore of using, notwithstanding there was no allegation in the petition respecting the fact that he was a musician, and that his injuries had deprived him of the power of pursuing that occupation.'"

26—Robinson v. St. L. & S. Ry. Co., 103 Mo. 110, 77 S. W. 493 (495).

"Plaintiff testified that he was in the race-horse business, buying and selling race horses, training them and putting them on race tracks; that before the injury he

§ 890. **Less Capable of Attending Business Than Before Injury.** The court instructs the jury that if, under the evidence and the instructions of the court, the jury find the defendant guilty, then, in assessing the plaintiff's damages, the jury may take into consideration not only the loss and immediate damage arising from the injury received at the time of the accident, but also the permanent loss and damage, if any is proved by the evidence, arising from any disability resulting to the plaintiff from the injury in question, which renders her less capable of attending to her business than she would have been if the injury had not been received.[27]

§ 891. **Reasonable Compensation for Impaired Ability to Labor and Pursue Business—Value of Personal Service in Management of Business Should be Considered.** The court instructs the jury that if they find from the evidence future disability, the plaintiff should be allowed a sum that would reasonably compensate him for his impaired ability to labor and earn money and manage and pursue his business in the future. The jury should consider, in estimating damages, the value of the personal services of the plaintiff in the management and pursuit of his business.[28]

§ 892. **Future Diminished Capacity to Labor and Earn Money.** (a) In the event of your verdict being for the plaintiff, in assessing his damages, you may take into consideration the reasonable value of time lost, if any consequent upon his injuries, the necessary sums of money, if any expended by him for medical attendance and medicine rendered necessary by his injuries, the bodily and mental pain, if any, suffered by, or that may be suffered, by reason of his injuries; and if you believe from the evidence, plaintiff's injury is permanent, and will impair his capacity to labor and earn money, in future, you may, in addition to the foregoing find such sum as will be a fair and reasonable compensation for his future diminished capacity to labor and earn money.[29]

(b) In arriving at the amount of the plaintiff's damage, you will consider his pain and suffering, and necessary and reasonable expenses of the medical aid, and if the injury is permanent, you may take such fact into consideration, and in that case you may consider the future effect of the injury upon the plaintiff's ability to engage in the ordinary occupations of life and his diminished working and earning capacity, if any.[30]

did his own training, but after the injury he was not able to train his horses, and had to hire and keep in his employ a trainer all the time; that his earnings had been $10,000 per annum over and above any money he had made by bets on races. Hence there was evidence of profits in his business and loss in those profits by being compelled to increase the expense of his business to the extent of hiring a special trainer."

27—N. C. St. R. R. Co. v. Brown, 178 Ill. 187 (189), aff'g 76 Ill. App. 654, 52 N. E. 864.

28—Jordan v. C. R. & M. C. Ry. Co., 124 Iowa 177, 99 N. W. 693 (694).

29—Galveston C. R. Co. v. Chapman, 35 Tex. Civ. App. 551, 80 S. W. 856.

30—Haggerty v. Strong, 10 S. D. 586, 74 N. W. 1037 (1039).

(c) The court instructs the jury that if you find for the plaintiff you will be required to determine the amount of damages. In determining the amount of damages plaintiff is entitled to recover in this case, if any, the jury have a right to, and they should, take into consideration all the evidence pertaining to plaintiff's physical injuries,—and such loss of time and inability to work in the future, if any, which the jury may believe, from the evidence, he will sustain on account of such injuries, and may find for him such sum as in the judgment of the jury, under the evidence and instructions of the court, will be a fair compensation for the injuries he has sustained or will sustain, if any, so far as such damages are claimed and alleged in the declaration.[31]

(d) If you believe, from the evidence, that his injuries, if any, are permanent, and will diminish his capacity to earn money in the future, then you should allow him such a sum therefor as you will believe from the evidence, etc.[32]

(e) The court instructs the jury that the plaintiff could recover in addition to the usual items of expense of treatment, past and future suffering, etc., the loss of earnings of the plaintiff which he has already suffered, and which you are reasonably certain he will suffer in the future.[33]

(f) In ascertaining what his impaired condition is, you must look to the testimony, and see what his earning capacity was, and what are his disabilities, if his injuries are temporary, if his capacity for labor is total or partial. All of these things should be taken into consideration in determining the amount, provided you find that he is entitled to recover.[34]

31—Richardson v. Nelson, 221 Ill. 254 (259, 260), 77 N. E. 5.

"The objections urged to this instruction are, that it allowed the jury to assess damages for the loss of time and loss of earning power during appellee's minority, and that it tells the jury that they may assess damages 'for injuries he has sustained or will sustain, if any, so far as damages are claimed and alleged in the declaration.' The declaration alleges damages because 'plaintiff became liable for and did lay out divers large sums of money in and about endeavoring to be healed and cured of his said sickness and disorders, amounting to, to-wit, $100,' etc. Standing alone, the instruction is subject to criticism, but if the instructions, taken as a series, state the law correctly, the error in the instruction may be obviated. The instruction is very general in nature, and is followed by an instruction given on behalf of the appellant which is clear and positive in its terms."

32—G. H. & S. A. Ry. Co. v. Collins, 31 Tex. Civ. App. 70, 71 S. W. 560 (561).

33—Heer v. Asphalt Paving Co., 118 Wis. 51, 94 N. W. 789 (791).

34—Central of Georgia Ry. Co. v. Grady, 113 Ga. 1045, 39 S. E. 441 (442).

"The exceptions to this charge embrace no complaint of its abstract correctness, but it is alleged to be erroneous because the court failed to charge various other principles which would have been appropriate. A portion of a charge wherein a complete, accurate and pertinent proposition is stated is not, in and of itself, erroneous, simply because it fails to embrace an instruction which would be appropriate in connection with that proposition. Lucas v. State, 110 Ga. 756, 36 S. E. 87. See, also, McIver v. G. S. & F. R. R. Co. 108 Ga. 306, 309, 33 S. E. 901; Wood v. Col-

(g) If the jury believe, from the evidence, that the plaintiff has been injured in health of body or strength of limb, or in his ability to labor and attend to his affairs, and generally pursue the course of life as he might otherwise have done, as well since as before the accident, and if the jury further believe, from the evidence, that such injuries were inflicted upon him through the negligence or carelessness of defendant's servants or employes, as charged in the declaration, and that the plaintiff was at the time exercising all reasonable care and caution to avoid such injuries, then the jury may assess such damages as will recompense to the plaintiff all the loss he may have sustained, as a necessary result of such injuries, as shown by the evidence.[35]

§ 893. **Loss of Time, Pain and Suffering, Medical Aid, Allowable—Whether Injury Is Incurable.** (a) If the jury find the issues for plaintiff, then the plaintiff is entitled to recover such actual damages as the evidence may show she has sustained as the direct or approximate result of such injury, taking into consideration her loss of time, her pain and suffering, her necessary and reasonable expenses in medical and surgical aid, so far as the same appear from the evidence in this case; and if the jury find from the evidence that the said injury is permanent and incurable, they may also take this into consideration in assessing the plaintiff's damages.[36]

(b) The court instructs the jury that if you find the defendant guilty, then in assessing the plaintiff's damages you should take into consideration the expenses incurred by him in being cured of his injuries, if any are shown, the value of his time lost, if any is shown by the evidence in consequence of his injuries, and a fair compensation for his physical pain and suffering, and any permanent disability (if any is shown by the evidence), and give him such an amount, as damages, as you find from the evidence he has sustained, if any.

(c) If from the evidence you find defendant guilty, then in assessing damages for the injury, if the evidence shows any has been received by the plaintiff, you are not confined to consider the direct expense the plaintiff incurred, if any is proved, but you may also consider the value of the loss of time, if any is shown by the evidence in consequence of the injury, and a fair compensation for his physical pain and suffering, if any is shown, and if the evidence shows that the plaintiff has received an injury which is permanent or likely to exist for a great length of time, you may give damages for the future

lins, 111 Ga. 32, 36 S. E. 423; Keys v. State, 112 Ga. 392, 37 S. E. 762, 81 Am. St. Rep. 63; Power Co. v. Walker, 112 Ga. 725, 38 S. E. 107; Macon C. St. Ry. Co. v. Barnes, 113 Ga. 212, 38 S. E. 756.

35—Indianapolis v. Gaston, 58 Ind. 224.

36—I. C. R. R. Co. v. Souders, 178 Ill. 585, 53 N. E. 408, reversing 79 Ill. App. 41 (50).

"In C. & E. I. R. R Co. v. Holland, 122 Ill. 470, 13 N. E. 145, an instruction almost identical with the one at bar, in a case where the proof was of like facts, was approved by the Supreme Court, and we see no reason under the evidence in this case * * * why there was error in giving this instruction."

as well as the present disability, to such an amount as the evidence shows he has sustained, if any.[37]

(d) If you find the issues for the plaintiff and find the defendant guilty, then you may assess the plaintiff's damages at such sum of money as will compensate him for: First. His necessary expenses in and about being treated for and cured of his injuries. Second. The damage sustained in his business. Third. The pain and suffering endured by him. Fourth. For any permanent injuries sustained by him so far as all these things (if proven) may be shown by the evidence.[38]

(e) The court further instructs the jury that if, under the evidence and instructions of the court, the jury find the defendant guilty, then in estimating the plaintiff's damages, it will be proper for the jury to consider the effect of the injury in future upon the plaintiff, if any is shown by the evidence in this case, the use of his foot and leg, his ability to attend to his affairs generally in pursuing any ordinary trade or calling, if the evidence shows that these will be affected in the future, and also the bodily pain and suffering he sustained, if any, and all damages present and future, if any, which, from the evidence, can be treated as a necessary and direct result of the injury complained of.[39]

§ 894. **Ability to Labor Before and After Injury—Physical Pain and Mental Anguish, etc.** In making up your verdict, if you find for the plaintiff, you will consider the ability of the plaintiff to earn wages and perform labor prior to the time of the alleged injury, as shown by the evidence, and also his ability to earn wages and perform labor since receiving the alleged injury, the time he lost, if any, because of said injury, the expenses, if any, for medical treatment and nursing, and the physical pain and mental anguish, if any, you find

37—Village of Ava v. Greenawalt, 73 Ill. App. 632 (634, 635 and 638).

"It is not necessary," said the court, "that a declaration shall contain an averment charging permanent injury, to warrant the admission of testimony tending to prove such injury, and the giving of an instruction directing the jury to consider such injury, if shown by the evidence in assessing damages, City of Chicago v. Michael Sheehan, 113 Ill. 658."

38—C. & A. R. R. Co. v. Fisher, 38 Ill. App. 33 (41 and 42).

"Strictly speaking, there can be no compensation for pain and suffering, neither can the value of a limb be determined in money. There is no market value for either, nor would any one seek to suffer the one, or the loss of the other, for a money compensation. But this does not take from the jury in proper cases the right to place a value upon either or both. We see no force in the objections."

39—Wrisley Co. v. Burke, 203 Ill. 250, aff'g 106 Ill. App. 30, 67 N. E. 818.

"It was contended that this instruction was misleading and vicious, because its tendency was to cause the jury, because of the phrase 'all damages present and future,' to award higher damages than it otherwise would. We think the objection is not justifiable. It only allows the jury to award damages in this action for bodily pain and suffering in the future as is stated in the instruction 'which, from the evidence, can be treated as the necessary and direct result of the injury complained of,' which is the law as established by repeated decisions of this and the Supreme Court."

he has suffered on account of the injury, and allow plaintiff such amount as you believe from the evidence he is justly entitled to; but, in arriving at the amount, if any, you allow for loss of future earnings, you will take into consideration the fact that such amount, if any, will be paid in a lump sum, and you will only allow for the present worth or value of the same.[40]

§ 895. **Injury to Passenger—Negligence in Moving Cars—Impairment of Capacity to Labor and Earn Money, Pain and Suffering, etc.** If you find that plaintiff has shown by a preponderance of the evidence that he entered one of the defendant's passenger cars at X— as a passenger, and that, while he was on said cars as a passenger, the employes of defendant violently, and with unusual force and roughness, pushed said car against other car or cars; and if you shall further find that such acts, if you shall so find, of pushing the car in which plaintiff was, against another car or cars violently, and with unusual force and roughness, was negligence of a carrier of passengers, as hereinbefore defined, and if you shall further find that

40—Lamb v. City of Cedar Rapids, 108 Iowa 629, 79 N. W. 366 (368).

"We said in Fry v. Railroad Co., 45 Iowa 416, of an instruction which directed the jury to allow the plaintiff in that case 'such damages as will fairly compensate her for all past, present or future physical suffering or anguish, which is, has been, or may be caused by said injury,' that it was too broad, and permitted the jury to enter the domain of conjecture, and indulge in speculation to a greater extent than was allowable; that the jury should have been directed that it could look alone to the evidence, and determine therefrom what damage it was reasonably certain the plaintiff would sustain in the future; and that an allowance could not be made for damage which might but was not reasonably certain to ensue. In the case of Kendall v. City of Albia, 73 Iowa 241, 34 N. W. 833, it appeared that the court had charged the jury that if the plaintiff in that case, as a result of an accident there in question, had 'by reason of said accident suffered bodily pain and mental anguish to the present, and will so suffer in the future, then for such pain and anguish, past, present and future, you should allow him such sum as you think proper, under the evidence, without proof of any special sum.' That was modified, however, by the following: 'With reference to future damages, you should be satisfied from the evidence that they will probably be sustained by the plaintiff.' And we held the two instructions, construed together, were correct. In Ford v. City of Des Moines, 106 Ia. 94, 75 N. W. 630, we considered the part of a charge which authorized a recovery for the impairment of power to enjoy life by reason of an injury, 'and for such pain and inconvenience and impairment of enjoyment for such time as the same has been or may continue as shown by the evidence in the future, if any,' and held it to be erroneous for the reason that it authorized the jury to allow for that which was merely possible, not for what the evidence showed was reasonably certain to continue. The charge under consideration is not quite so definite and certain as were the two considered in the case of Kendall v. City of Albia, supra, but it is not correct to say that no rule whatever for ascertaining future damages was given. The direction to allow plaintiff 'such amount as you believe from the evidence he is justly entitled to' referred as well to future as to past damages, and required the jury to make such an allowance for future damages as it believed from the evidence he should have. The jury must so have understood the paragraph, and, in the absence of a request for a more definite instruction, it was sufficient."

said act of negligence, if you shall so find, was the proximate cause of the injuries, if any, you find plaintiff received and of which he complains in his petition then you will find for plaintiff, unless you shall find from a preponderance of the evidence that plaintiff was guilty of contributory negligence, or unless you find that he assumed the risks usually incident to making such coupling mentioned in paragraph 9 of the charge. If, under the foregoing instructions, you find for plaintiff, then in estimating the damages you may take into consideration any impairment of his capacity to labor and earn money, if any, his mental and physical suffering present and future, if any, and in your dispassionate judgment will allow him such sum as will fairly compensate him in so far as the evidence may here show you, he is entitled to damages in these respects. You cannot, however, consider any injury or impairment of plaintiff or damages resulting therefrom, which is not the direct and proximate result of the injuries, if any, received by plaintiff on the night of April 1, 190..[41]

§ 896. **What is Reasonably Expended for the Purpose of Being Cured is Recoverable—Also Lost Earnings, For Disfigurement of Person and Impaired Use of Hand.** The jury are instructed that in estimating the plaintiff's damages he would be entitled to such a sum as he reasonably expended for the purpose of being cured of his injury, and such sum as he lost for his earnings by reason of the time which was necessarily lost by his injury. He is also entitled to such sum as will fairly compensate him for the disfigurement of his person, and the impaired use of his hand.[42]

If the jury finds, from the evidence, that the plaintiff is entitled to recover, as alleged in his declaration, in estimating the plaintiff's damage, you may take into consideration his physical condition prior to the injury and also his physical condition since the injury, if you believe, from the evidence, that his physical condition since then is impaired as the result of such injury, and that he has been deprived of his ability, since the injury, to earn money; and you may also consider whether or not he has been permanently injured and to what extent; and to what extent, if any, he may have borne physical and mental suffering as a natural and inevitable result of such injury; and also any necessary expenses he may have been put to in and about caring for and curing himself, and the value of any time you may believe, from the evidence, he has lost on account of such injury, and you may consider what, if any, effect such injuries may have upon him in the future in respect to pain and suffering, or in respect to his power to earn money by his labor; and

41—St. L. Sn. Ry Co. of Texas v. Morrow. — Tex. Civ. App —, 93 S. W. 162 (163).

42—Hullehan v. Green Bay, W. & St. P. R. Co., 68 Wis. 520, 32 N. W. 529 (533).

"It is urged that in this statement the court improperly included 'what he had reasonably expended for the purpose of being cured of his injuries.' There can be no doubt but that this is a proper item of damages in cases of this kind."

you should allow to him as damages such sum as in the exercise of a sound discretion you may believe, from the facts and circumstances in evidence, will be a fair and just compensation to him for the injury he has sustained.[43]

§ 897. **Loss Must be Directly Caused by Injury—If Injured Failed to Make Reasonable Effort to Earn Money After Injury, Loss Cannot be Charged to Defendant.** (a) Plaintiff claims to have lost earnings from his business by reason of his injuries. It matters not what loss there has been, if any, in the earnings of the plaintiff, unless that loss was directly caused by the necessary result of the injury received on ———. If plaintiff could have earned money by reasonable effort, neglected so to do, he cannot charge his loss, if any, to defendant.[44]

(b) If you find the defendant guilty, you should assess against it such damages as you believe from the evidence, the plaintiff sustained as the direct result of defendant's negligence.[45]

§ 898. **Mental and Physical Suffering—Loss of Time, etc.** (a) If you find a verdict for the plaintiff, he will be entitled to any damages that will compensate him for the injuries which he suffered in consequence of the acts complained of, and, in determining what, you may consider properly any mental or physical suffering which he had endured in consequence of it, or any expense that he was put to, if any expense has been shown.[46]

(b) In the event you find for plaintiff and allow him damages, you should allow him such sum as you believe from the evidence will compensate him for the injuries sustained; and in estimating his damage, if any, you may take into consideration the mental and physical pain suffered, if any, consequent upon the injuries received, and the reasonable value of time lost, if any, consequent upon his injuries; and if you believe from the evidence that his injuries are permanent, and will disable him to labor and earn money in the future, then you may, in addition to the above, find such further sum as will be a fair compensation for his diminished capacity, if any, to labor and earn money in the future.[47]

43—Howe v. Medaris, 82 Ill. App. 515 (518).

44—Feary v. Met. St. Ry. Co., 162 Mo. 75, 62 S. W. 452 (458).

45—Lovett v. City of Chi., 35 Ill. App. 570.

"Apellant objects to the word 'direct' in the instruction, and says the small amount of the verdict was caused by the use of that word. The words 'natural and proximate' are more commonly used than 'direct' and for that reason may be said to be more appropriate. But the word 'direct' is often used in the decided cases as synonymous with those in more general use, I. B. & W. R. Co. v. Burney, 71 Ill. 381; Slater v. Rink, 18 Ill. 527; Walrath v. Redfield, 11 Barb. 368 (N. Y.); Clemens v. Hannibal & St. J. R. R. Co., 53 Mo. 366, 14 Am. Rep. 460; Salem Bank v. Gloucester Bank, 17 Mass. 32, 9 Am. Dec. 111."

46—Hull v. Douglass, — Conn. —, 64 Atl. 351.

47—G. H. & S. Ry. Co. v. Lynch, 22 Tex. Civ. App. 336, 55 S. W. 389 (391).

"The charge correctly states the measure of damages. G. C. S. & F. Ry. Co. v. Waldo, — Tex. Civ. App. —, 32 S. W. 783; Knittel v. Schmidt, 16 Tex. Civ. App. 7, 40 S. W. 507."

(c) You are instructed that in the event you find in favor of the plaintiff, K...., in estimating the actual compensatory damages, if any, to which he is entitled, you may take into consideration the value of the time lost, if any, by the plaintiff, while disabled from his injuries, if any, to work and labor, taking into consideration the nature of his business, and the value of his services in conducting the same; fair compensation for the mental and physical suffering, if any, caused him by his injuries, if any, and the probable effect in the future, if any, of the injuries upon his health and the use of his limbs; awarding him, as a whole, only such a sum of money as the present cash value of which would actually compensate him for the injuries sustained.[48]

(d) If from the evidence and under these instructions, you find the defendant guilty, then, in determining the amount of damages, if any, which the plaintiff may recover in this case, the jury have a right to, and they should, take into consideration all the facts and circumstances in evidence before them; the nature and extent of plaintiff's physical injuries, if any, testified about in this case, and, so far as shown by the proof, his suffering in body and mind, if any, shown by the evidence to be resulting from such injuries, if any, and also such prospective suffering and loss of health, if any, as the jury may believe, from the evidence before them in this case, he has sustained or will sustain by reason of such injuries, and may find for him such sum as, in the judgment of the jury, under the evidence and instructions of the court, will be a fair and actual compensation for the injuries he has sustained, if any, so far as such damage and injuries, if any, are claimed and alleged in the declaration herein.[49]

(e) In estimating her damages you may, in connection with her personal injuries, take into consideration her pain and suffering, if any are proven, undergone by her in consequence of her injuries, if any are proved.[50]

(f) The court instructs the jury that if under the evidence and instructions of the court the jury find the defendant guilty, then in estimating the plaintiff's damages, if any, it will be proper for the jury to consider the effect, if any, of the injury upon the plaintiff, and also the bodily pain and suffering, if any, she sustained, and all damages if any, charged in the declaration, and which from the evidence are shown to be the necessary and direct result of the injury complained of.[51]

48—Tex. & N. O. R. Co. v. Kelly, — Tex. —, 80 S. W. 1073 (1078).

"Loss of time is allowed only up to the time of the trial, and the elements of damage are correctly analyzed and separated, S. A. & A. P. Ry. Co. v. Keller, 11 Tex. Civ. App. 569, 32 S. W. 848; G. C. S. & F. Ry. Co. v. Waldo, — Tex. Civ. App. —, 32 S. W. 785."

49—W. C. St. R. R. Co. v. Johnson, 180 Ill. 285 (286), aff'g 77 Ill. App. 142, 54 N. E. 384.

50—The C. C. R. Co. v. Anderson, 182 Ill. 298, 55 N. E. 366.

51—C. C. Ry. Co. v. Mead, 107 Ill. App. 649 (652), aff'd 206 Ill. 174, 69 N. E. 19.

The court said that "this instruction may be subject to technical criticism; it has, however, been substantially approved in C. B. &

(g) If you find for the plaintiff, you should allow him such sum, not to exceed the amount claimed by him in his petition, as will reasonably compensate him for the pain and suffering, if any, or loss of time, if any, or both, suffered, or that will be suffered by him because of his injuries, if any, sustained by him by reason of colliding with the car of the defendant at the intersection of T—— avenue west and S—— street west, on or about the — day of ———.[52]

§ 899. What May be Considered In Assessing Damages—Past and Future Bodily Pain and Mental Suffering. (a) If your verdict is for the plaintiff, you will assess his damages at such a sum as from the evidence you believe will fairly compensate him for any injury of person which he has suffered by reason of the said accident, considering whether you believe any such injury is temporary or permanent; for any pain of mind or body which from the evidence you believe he has suffered or may suffer by reason of the said accident; for any earnings which from the evidence you believe he has lost or may lose by reason of the accident; for any expenses for medicines or medical attention or care which you may believe from the evidence have been necessitated or may be required by him by reason of the said accident, considering the fair and reasonable value thereof. If your verdict is for the defendant, you will simply so state in your verdict.[53]

(b) If the jury find for the plaintiff, then in estimating her damages you may take into consideration all of the mental and physical pain and anguish already suffered by her, if any, and all future mental and physical pain and anguish, if any, that will reasonably result to her from said injuries; and, if the jury find that her injuries are permanent and lasting in their character and effect, they should take this fact into consideration; and the jury should assess plaintiff's damages at such sum as, in their judgment, will compensate her for all sufferings, both past and future, if any, and for permanent disability, if any, that have or will reasonably result to her by reason

Q. R. R. Co. v. Warner, 108 Ill. 545. In N. C. St. R. R. Co. v. Gastka, 27 Ill. App. 522, and in the latter case by the Supreme Court in 128 Ill. 613, 21 N. E. 522."

52—Stanley v. Cedar R. & M. C. Ry. Co., 119 Iowa 526, 93 N. W. 489 (493).

53—McLain v. St. L. & S. Ry. Co., 100 Mo. App. 374, 73 S. W. 909. "In an action for personal injuries the right of recovery is not limited to past bodily pain and suffering, but the party is also entitled to compensation for such future sufferings as the evidence tends to prove will result from the injuries. The plaintiff was permitted to introduce the testimony of medical experts to establish the probable consequences of his injuries and their permanent character, and the court in its instructions allowed as an element of damages such pain of mind or body as he might suffer as well as compensation for such he had suffered, and this constituted no error. In determining the amount of damages from a personal injury, the jury are justified in considering not only the bodily pain and mental suffering already undergone, but such as are likely to result in the future, Sedgwick, Dam., Vol. 1, par. 86; Sutherland, Dam., Vol. 1, par. 253; Gorham v. Ry., 113 Mo. 408, 20 S. W. 1060." But see McKinstry v. St. L. T. Co., — Mo. —, 82 S. W. 1108, citing Walker v. St. L. Ry. Co., — Mo. App. —, 80 S. W. 282.

of her injury, not exceeding the sum of $10,000, the amount claimed in plaintiff's petition.[54]

(c) If the jury find for the plaintiff, they will assess his damages at such sum as they shall believe, from the evidence, will be a fair compensation to him for all injury to his person, and physical and mental pain and suffering, if any, caused him by the wrongful conduct of the defendant's servants and agents, as in these instructions set out.[55]

(d) If the jury find in favor of the plaintiff, they should assess her such damages as they think, under the evidence, would compensate her for the pain and suffering she has endured by reason of her injuries, and such further sum as they think would fairly compensate plaintiff for the injuries sustained.[56]

(e) If the jury find the issues for the plaintiff, then in determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to and they should take into consideration the nature and extent of plaintiff's physical injuries, if any, shown by the evidence in this case, the pain and anguish which he has suffered or will suffer in consequence of said injury, if any, shown by the evidence in this case, and any and all damages to his person, permanent or otherwise, resulting from said injuries, as the jury may believe, from the evidence before them in this case, he has sustained or will sustain by reason of such injuries, if any.[57]

(f) I further instruct you that, in estimating the compensatory damages in cases of this character, all the consequences of the injury, future as well as past, are to be taken into consideration, in-

54—Elliott v. Kansas City, 174 Mo. 554, 74 S. W. 617.

55—Murphy v. St. L. T. Co., 96 Mo. App. 272, 70 S. W. 159 (161).

"An objection urged to that charge is that it failed to restrict the amount of damages which might be awarded to the sum demanded in the petition; but as the demand was for $5,000, and the jury only awarded $500, the objection will be passed over without further comment."

56—Ilges v. St. L. T. Co., 102 Mo. App. 529, 77 S. W. 93 (95).

"The plaintiff objected to the above instruction, and counsel insists here that it gave the jury a boundless commission to assess damages. The word 'think' has various meanings. Its meaning must be ascertained from the connection in which it is used in a sentence. Some of its meanings, according to Webster, are 'to form an opinion by reasoning; to judge; to conclude; to believe.' The jury, by the instruction, were required to think of the damages under the evidence, not outside of it, and to think out (judge) the damages from the evidence. We see no substantial objection to the wording of the instruction, and we think that it was as well understood by the jury as if the word 'believe' or 'find' had been used instead of the word 'think.'"

57—W. Chi. St. R. R. Co. v. Schwartz, 93 Ill. App. 387.

"We think that the proof showing that the plaintiff lost both his legs is a sufficient basis for the allowance of damages for future suffering. Common sense and ordinary human experience would lead any reasonable person to the conclusion that such an injury would cause future physical suffering, C. B. & Q. R. R. Co. v. Warner, 108 Ill. 538; N. C. St. R. R. Co. v. Shreve, 70 Ill. App., 666-9, aff'd 171 Ill. 438, 49 N. E. 534. We do not think the instruction can be said to allow the jury to consider mental suffering as distinct from bodily suffering."

cluding the bodily pain which is shown by the proofs to be reasonably certain to have naturally resulted from the injury.

(g) The injured party, when entitled to recover, should be awarded compensation for all the injuries, past and prospective. These are intended to include and embrace indemnity for actual nursing and medical expenses which were paid by the plaintiff. The elements of damages which the jury are entitled to take into account consist of all the effects of the injury complained of, consisting of personal inconvenience, the sickness which the plaintiff has endured, all bodily and mental suffering, permanent annoyance which is liable to be caused by the deformity resulting from the injury; and, in considering what would be a just sum in compensation for the suffering from the injury, the jury are not only at liberty to consider the bodily pain, but the mental suffering, anxiety, and suspense, which may be treated as elements of the injury, for which damages, by way of compensation, should be allowed; and all these last mentioned elements of damage are, in their very nature, not susceptible of any precise or exact computation. The determination of the amount is committed to the judgment and good sense of the jury, and, if you find for the plaintiff, such sum should be awarded as will fairly and fully compensate her for all damages which she has sustained, consisting of the elements referred to, and not exceeding in amount the sum claimed in the declaration.

(h) Then the jury have a right to find for her in such an amount of damage as they believe, from the evidence, will compensate her for the personal injury she has sustained, and for her loss of time in the transaction of her own individual business and in endeavoring to be cured of her injury, so far as that expense has been borne by her individually, and any such loss and expense as has been sustained and paid by her or incurred by her for all pain and suffering which she has already endured and which she may endure hereafter, and for any permanent injury that is sustained, if the proofs are sufficient to convince this jury that the injury is permanent.[58]

(i) The court instructs the jury that if they believe from the evidence that the defendant company was guilty of the negligence charged in the declaration and that the plaintiff has suffered injury by reason thereof, then in estimating the damage of the plaintiff in this case, you are to take into consideration the physical pain and suffering of the plaintiff, if any has been shown by the evidence, the amount expended in her efforts to be cured, if any has been shown, the impairment of her ability to earn money in the future, if any has been shown, and the present physical condition of the plaintiff, as shown by the evidence, as well as the probability or improbability of her future recovery, as you may believe from the evidence, and from the evidence of these several matters and from your own knowledge

58—Gilson v. City of Cadillac, 134 Mich. 182, 95 N. W. 1084.

of the common affairs of life arrive at a fair estimate of her damages, if any.[59]

§ 900. **Bodily Injuries and Disabilities—Suffering and Distress of Mind—What Is Allowable.** (a) If now you shall find for plaintiff you will allow him for what he has paid or become liable for as medical bills on account of his injuries, not to exceed a reasonable sum, and what you find and believe to be just pecuniary compensation for the bodily injuries and disabilities and suffering and distress of mind caused by the fall in alighting from the train.[60]

(b) In estimating such damages you will take into consideration the physical and mental injuries, if any, you may believe from the evidence she has undergone by reason of such negligence, if any; and if her ability to labor and earn money as a seamstress and to attend to her domestic duties has been impaired by reason of such injuries, if any, and by reason thereof she has lost time, and you find that the defendant is liable under this section of the charge, then you will award plaintiff the reasonable value of the time so lost, and also the reasonable and necessary medical bills paid or incurred by reason of her injuries, if any; and if you believe from the evidence that the injuries to plaintiff's wife, so received, if any, are permanent or if she has not recovered therefrom, then you will take this fact into consideration in estimating the damages if any, you find.[61]

59—Chi. U. T. Co. v. Miller, 212 Ill. 49 (55), 72 N. E. 25.

"It is urged that this instruction is erroneous in that it fails to confine the jury to such damages as resulted from the accident. So far as this criticism is concerned, we think it is obviated by instructions 18, 14 and 16 given on the part of the defendant, within the rule followed by this court in Wenona Coal Co. v. Holmquist, 152 Ill. 581, 38 N. E. 946, and Beidler v. King, 209 Id. 302, 70 N. E. 763. By each of these three instructions last mentioned, the jury were advised that she could only recover such damages as were the result of the accident complained of, and these instructions, when read in connection with this instruction, clearly advised the jury as to the law in that regard."

60—St. L. S. W. Ry. Co. of Tex. v. Highnote, — Tex. —, 84 S. W. 365 (368).

"The contention is that it allows a double recovery for bodily injuries and in addition for disabilities. We do not think this interpretation can be placed upon the charge. The terms 'injuries' and 'disabilities' evidently refer to the same thing, and one recovery for this only was warranted. It is also contended that compensation is permissible under the charge for suffering of the mind and also for distress of mind. The term 'suffering,' as used in the charge, was evidently intended to refer to physical pain, but if construed to refer to mental distress the charge only permits of one recovery for that element of damage. We are of the opinion there is no error in the charge."

61—Red River, T. & S. Ry. Co. v. Reynolds, — Tex. Civ. App. —, 85 S. W. 1169.

"The next preceding paragraph of the charge, after submitting affirmatively the issue of negligence as the proximate cause of injury to appellee's wife concluded as follows: 'Then you will find for the plaintiff such damages as you may believe from the evidence will be a reasonable and just compensation for the injuries so received and resulting by reason of such negligence, if any.' Thus in the first instance, and in a general way, the court correctly instructed the jury to allow appellee reasonable and just compensation for the injuries received by his wife; referring them to the evidence for

(c) The jury may find the damages in such sum as will compensate the plaintiff for the injury received, and in so doing may take into consideration his bodily and mental pain and suffering, both taken together, but not his mental pain alone, the inconvenience to him of being deprived of his leg, and loss of time and inconvenience in attending to his business generally, from the time of the injury to the present time, such as the plaintiff may have proved, and the jury are satisfied, to a reasonable certainty, inevitably and necessarily resulted from the original injury.[62]

(d) The court instructs you, gentlemen of the jury, that if you find for plaintiff you should, in estimating his damages, consider his physical condition before and since receiving the injuries for which he sues, as shown by the evidence, the physical pain and mental anguish, if any, suffered by him on account of his injuries at the time of and since such injuries, as shown by the evidence; and for such mental anguish and physical pain and injury, if any, as you may, from the evidence, find it is reasonably certain he will suffer in the future therefrom, and you will find a verdict for such sum as, in your judgment, will, under the evidence, reasonably compensate him for such injuries.[63]

the character of the injuries, and the extent of the damages. This was followed by the paragraph complained of, and quoted above, which merely stated in detail what the jury would take into consideration, if warranted by the evidence, in estimating the damages, enumerating first the items of loss which the evidence tended to show had already been sustained, and then directing their attention to the issue, raised both by the pleadings and the evidence, of loss thereafter to result from existing or permanent injuries. We fail to see how any sensible jury could reasonably have been misled by this charge into giving double damages. Read in connection with the next preceding paragraph, it submitted the issue of damages in a logical and reasonably perspicuous manner. The last clause, so much objected to, might have gone a little farther, and explained more fully how the damages for permanent injuries were to be measured; but as no further instruction on that subject was requested, and as the court had already stated the rule in general terms, we must overrule the contention of appellant that this clause of the charge gave the jury a 'roving commission.' The clause, 'or if she has not recovered therefrom' merely suggested in another form the idea of future loss for which compensation was to be made if warranted by the evidence."

62—Kennon v. Gilmer, 131 U. S. 22 (26), 9 S. Ct. 696.

"The defendants objected to this instruction, that the jury were permitted to assess damages for mental suffering. But the instruction given only authorized them in assessing damages for the injury caused by the defendants to the plaintiff, to take into consideration 'his bodily and mental pain and suffering, both taken together,' ('but not his mental pain alone') and such as 'inevitably and necessarily resulted from the original injury.' The action is for an injury to the person of an intelligent being; and when the injury, whether caused by willfulness or by negligence, produces mental as well as bodily anguish and suffering, independently of any extraneous consideration or cause, it is impossible to exclude the mental suffering in estimating the extent of the personal injury for which compensation is to be awarded. The instruction was in accord with the opinions of this court in similar cases."

63—Maguire v. St. L. T. Co., 103 Mo. App. 459, 78 S. W. 838.

"Mental anguish that is incident to bodily pain caused by an injury is a proper element of damages,

(e) If the jury finds the plaintiff is entitled to recover, they are authorized to give him damages, up to the amount claimed in the complaint, for all injuries he has received that they may find he has received; also for all pain and suffering, mental or physical, that they may find he has experienced from such injuries. And if he is permanently injured they may take that into consideration, and also all expenses he may have been at or is liable for because of such injuries as he may have received from the negligence of the defendant.[64]

§ 901. **Damages For Future Pain and Suffering—Jury Should Not Speculate, but Should Base Such Damages On the Evidence—Left Largely to Sound Discretion When Guided by Testimony.** (a) If, under the evidence and the rules before given, you find the plaintiff is entitled to recover, she should be allowed such sum, not exceeding the amount claimed as will compensate her for the pain and inconvenience of body and anguish of mind which she has suffered on account of the injury, if any, sustained by her; and, if the injury be permanent, or if the plaintiff still suffers therefrom, and it is reasonably certain she will in the future so suffer, she should be allowed such sum as will compensate her for whatever pain and inconvenience of body and anguish of mind, if any, which is reasonably certain from the evidence that she will be subjected to in the future. You should indulge in no speculation, and the amount of damages, if any are allowed, for the pain and inconvenience of body and the anguish of mind must be based upon the evidence, with respect to what, if any, suffering the plaintiff has endured or will endure. The amount to be allowed as such damages is not a matter to be shown in evidence, but is left very largely to your sound discretion, when guided by the testimony. If you find in favor of the plaintiff, then she should be allowed such sum as the evidence shows she has expended or become liable for her medical attendance, on account of the injuries, if any, she received by the accident complained of.[65]

(b) If the jury, under the evidence and instructions of the court, find for the plaintiff, they should assess the plaintiff's damages, and in assessing his damages the plaintiff will be entitled to recover for any

and may be inferred from the nature of the injury, Seawell v. K. C. Ft. S. M. R. Co., 119 Mo. 222, 24 S. W. 1002; Brown v. H. St. J. R. Co., 99 Mo. loc. cit. 319, 12 S. W. 655. Mental anguish can be recovered for coextensively with physical injury, and, so long as the injury continues to give intense pain, mental anguish will be inferred to coexist, Union P. R. Co. v. Jones, 49 Fed. 343, 1 C. C. A. 282; Ball v. Mabry, 91 Ga. 781, 18 S. E. 64. In this state the general rule is that pain of body and mind, when connected with physical injury, is a subject of damages, Trigg v. Railroad, 74 Mo. 147, 41 Am. Rep. 305. And when the injury is permanent, and future physical and mental pain are reasonably certain, and are the necessary and natural result of the act complained of, they are proper elements to be taken into consideration in estimating the damages, State v. Goode, 24 Mo. 361."

64—Kennedy v. So. Ry. Co., 59 S. C. 535, 38 S. E. 169.

65—Rice v. Council Bluffs, 124 Iowa 639, 100 N. W. 506 (507).

pain and anguish which he has suffered, or will hereafter suffer, in consequence of said injury, for any and all damages to his person, permanent or otherwise, occasioned by said injury; and generally, the plaintiff will, if the jury find the defendant guilty, be entitled to recover all damages alleged in the declaration, which they may believe from the evidence he has sustained by reason of said injury.[66]

§ 902. **Loss of Time and Expenditures and Probable Amount of Pain Plaintiff will Suffer in the Future—Past Suffering.** (a) If you find for the plaintiff in this action and if you find by a fair preponderance of the proofs that he will suffer pain in the future and will be subject to loss of time and expenditures because of such injuries, then you are instructed that you can, in estimating his damages, take into consideration the probable amount of pain he will suffer, the probable loss of time and the probable amount of expenditures he will be put to in the future on account of such injuries, all of which may be in addition to the other items, if any, that may enter into your calculations, but in no event shall the amount of your verdict exceed the sum sued for by the plaintiff, to-wit, $.....[67]

(b) If you believe, from the evidence, that the plaintiff has sustained injuries on account of the negligence of the defendant as set forth and claimed in his declaration, then the measure of his recovery is such damages as will compensate him for such injuries. The elements which may enter into such damages are the following: First, such sum as will compensate him for the expenses, if any, which he has paid in his efforts to effect his cure, and for his care and nursing during the period that he was disabled by the injuries, if the evidence shows that he was so disabled; second, the value of his time as shown by the evidence during the period he was so disabled; third, if such injuries have impaired his power to earn money in the future, then such sum as will compensate him for such loss of power; fourth, such reasonable sum as you may award him on account of the pain and anguish, if any be shown, that he has suffered by reason of such injuries. The first and second of these elements are the subjects of direct proof, and are to be determined by you on the evidence. The third and fourth of these elements are from necessity left to your sound discretion, but your conclusion should be based upon all the evidence, facts and circumstances in evidence before you.[68]

66—Chi. C. Ry. Co. v. Allen, 68 Ill. App. 472.

"The most careless reading of the instruction could never extend its meaning to anything beyond what the jury might 'believe from the evidence' to be the consequences of the alleged negligence."

67—Cole v. Seattle, R. & S. Ry. Co., 42 Wash. 462, 85 Pac. 3.

"This instruction, we think, is within the rule heretofore announced by this court. See Gallamore v. Olympia, 34 Wash. 379, 75 Pac. 978; Webster v. Seattle, R. & S. Ry. Co., 42 Wash. 364, 85 Pac. 2."

68—I. C. R. R. Co. v. Cole, 165 Ill. 334 (337), aff'g 62 Ill. App. 480, 41 N. E. 275.

(c) The court instructs the jury that, if they find the plaintiff is entitled to recover, they may take into consideration, in making up their verdict, the probable amount of pain, the probable loss of time and the probable amount of expense she will suffer and be subjected to in the future on account of her injuries.[69]

§ 903. **Damages for Pain and Suffering, Mental or Physical—Permanency of Injury—Physician's Fees.** (a) If the jury find that plaintiff is entitled to a verdict, the question of amount of the verdict will arise. If entitled to a verdict, they may assess such reasonable damages as they deem right for compensation for mental anguish and pain suffered by her, if any, in consequence of the injury received, and for compensation for the injury received, if any, and also for amount of physician's fees reasonably paid by her.[70]

(b) The court instructs the jury that, if you find for the plaintiff in this case, then the plaintiff is entitled to recover such actual damages as the evidence may show she has sustained as the direct or approximate result of such injury; taking into consideration her pain and suffering, so far as the same may appear from the evidence; and if the jury find, from the evidence, that the said injury is permanent and incurable, they should take this into consideration in assessing the plaintiff's damages.[71]

(c) The jury are further instructed that if, under the evidence and instructions of the court, they find the defendant guilty, then in estimating the plaintiff's damages, if any, they have a right to take into consideration the personal injuries inflicted upon the plaintiff, if any; the pain and suffering undergone by him in consequence of his injury, if any are proved; and also any permanent injuries sustained by him, if the jury believe from the evidence that the plaintiff has sustained such permanent injuries from the wrongful acts complained of.[72]

(d) If the jury find the issues for the plaintiff, then in determining the amount of damages which the plaintiff is entitled to recover in this case (if the jury find, from the evidence, under the instruc-

69—Gallamore v. Olympia, supra.

70—Ala. G. S. R. Co. v. Siniard, 123 Ala. 557, 26 So. 689 (691).

"Of course the plaintiff, if entitled to recover at all, was entitled to recover the amount of fees she had reasonably paid to physicians in treating her; and if this charge means other than this, in the part of it which is objected to, we confess our inability to see it. The complaint counts generally upon the negligence of plaintiff's trainmen. This is the usual and quite sufficient averment when recovery is sought by a passenger for injuries sustained through the improper handling of the train; and it has never been supposed, and is not the law, that to recover in such case, the plaintiff must show that each of the trainmen was negligent, and that the negligence of each combined with the negligence of the others to produce the result complained of. This plaintiff fully discharged the burden that rested upon her in this connection when she showed that she was injured by the untimely and sudden starting of the train."

71—N. C. St. R. R. Co. v. Shreve, 171 Ill. 438 (441), aff'g 70 Ill. App. 666, 49 N. E. 534.

72—Penn. Co. v. Reidy, 99 Ill. App. 477.

tions of the court, he is entitled to recover any damages), the jury have a right to and should take into consideration all the facts and circumstances in evidence before them; and they may consider the nature and extent of the plaintiff's injuries, if any, testified about by the witnesses in this case, and herein complained of; his bodily pain and suffering, if any is shown by the evidence, resulting from such injuries, permanent disability, if any, is shown by the evidence, caused by said injuries; the money necessarily paid, if any, by the plaintiff in and about endeavoring to be healed or cured of said injuries; and any future bodily pain or suffering, or future disability to labor or transact business, if any, that the jury may believe, from the evidence, the plaintiff will sustain as the necessary and direct result of the injuries complained of.[73]

(e) The court instructs you that if, under the evidence and instructions of the court, the jury find the defendant guilty as charged in the plaintiff's declaration, then in estimating the plaintiff's damages, it will be proper for the jury to consider the effect of the injury in the future upon the plaintiff, the use of his hand, and his ability to attend to his affairs generally, if the evidence shows that these will be affected in the future; and also the bodily pain and suffering he sustained, if any, and all damages, present and future, if any, which from the evidence appear to be the necessary and direct result of the injury complained of.[74]

§ 904. **Injury in Elevator—Prospect of Ultimate Recovery, Pain and Suffering, etc., to Be Considered in Assessing Damages.** The

73—W. C. St. R. R. Co. v. Maday, 88 Ill. App. 49, aff'd 188 Ill. 308, 58 N. E. 933.

"The objections," said the court, "to this instruction urged by attorney for appellant are not well founded. It does not follow from the language here employed that the jury should, in determining the amount of damages, if any, consider any testimony which does not bear directly on that question. The fifth instruction given in the case of H. & St. J. R. R. Co. v. Martin, 111 Ill. 219-227, contains all the features which are pointed out by the attorney for appellant in his objections to the instruction in the case at bar of which complaint is made. The Supreme Court held that the giving of the instruction mentioned was not error. The second instruction given in Penn. Co. v. Frana, 112 Ill. 398, is not quoted at length in the report of that case. But the Supreme Court in speaking of it says this, 'The second instruction, to which objection is made, declared in substance that if the jury believed from the evidence under the instructions of the court that the plaintiff was entitled to recover, then in fixing the damages the jury should take into consideration all the circumstances as disclosed by the evidence, 'such as the circumstances attending the injury.' Under this last clause of the instruction, counsel for the appellant urged that the jury might give punitive damages. There was no evidence introduced on the trial which would authorize the jury to give punitive damages, and by the terms of the instruction they were limited and confined to the evidence in making a verdict. Indeed, so far as appears from the record, there was no pretense on the part of plaintiff that he was entitled to recover punitive damages. As no such claim was made, and as no evidence was offered to establish a claim of that character, the instruction could not have misled the jury.' That comment by the Supreme Court applies with equal force to the case at bar."

74—W. U. Tel. Co. v. Woods, 88 Ill. App. 375 (379).

court further instructs the jury that, if they believe from the evidence that the plaintiff was injured while descending from the fourth to the second floor of the building occupied by the firm of .... at the time of the accident in one of the elevators then in use by said firm, and in the manner and form as charged by the declaration, or either of the counts thereof, and that, under the evidence and the law as given to you by the court, he is entitled to recover at your hands, then in estimating the plaintiff's damages, the jury may take into consideration the expense reasonably incurred by him in endeavoring to be cured of such injuries, his pecuniary loss, if any, shown by the evidence, his present physical condition and the disability to carry on the employment or business in which he was engaged at the time of said accident, and the prospect of his ultimate recovery, including such damages for pain and suffering endured by him while recovering from such injuries as the jury may believe from the evidence he is entitled to from all the facts and circumstances in the case.[75]

§ 905. Elements That Jury May Consider—Pain and Suffering—Enlightened Consciences of Honest Jurors—Their Sense and Judgment. (a) In regard to measure of damages for pain and suffering, the law says that is left entirely to the enlightened consciences of honest jurors. Whatever you believe he is entitled to, as honest jurors, you may give him for pain and suffering. If you find that the plaintiff is entitled to recover, then whatever amount you may see proper to give him for pain and suffering you will add to whatever amount he may be entitled to for damages to his property. Whatever amount he is entitled to for pain and suffering, and whatever amount he would be entitled to for loss of time, and whatever amount you may see proper to give him by reason of his incapacity by reason of the injury sustained, after having computed the same by the life tables and the rules I have given you, whatever amount he has sustained by reason of damage to his property, if any, you find the sum total.[76]

(b) If you find him entitled to recover, he should be allowed a fair and reasonable compensation for his injuries. In estimating his damages, no precise rule can be given for the amount to be allowed, as they are not in their nature susceptible of exact money valuation. You are to use your own sense and judgment, and be guided by the evidence, in allowing him such sum as will reasonably compensate him. In making up this amount, you should award, as may appear from the evidence, the reasonable value of the time lost because of the injury, the amount he has paid for medical attendance

The court held that had the suit been by an adult the above instruction would have been entirely proper; to give it in the case of a minor 15 years old was error, for the reason that the damages for loss of time for the period between the time of the injury and his majority, if any, could have been recovered by the parents.

75—Field v. French, 80 Ill. App. 78 (86).

76—City of Columbus v. Sims, 94 Ga. 483, 20 S. E. 332.

and nursing, and fair compensation for the bodily pain and suffering caused by the said injury; and if you further find that plaintiff's injuries are permanent, and will to some extent disable him in the future, and cause him pain and suffering hereafter, you should also allow him such further sum as paid now in advance, will reasonably compensate him for such future disability, pain and suffering as the evidence shows it is reasonably probable will result to him in the future from such injuries.[77]

(c) You are instructed that there can be no fixed measure of compensation for the pain and suffering of body and mind, nor for the loss of time and care in business.[78]

§ 906. **Damages for Impairment of Mental Powers, Health, etc.—Due Care.** (a) You should consider the nature and extent of her injuries and physical pain and suffering, and the mental injury and anxiety which she has endured, and the extent of impairment, if any, of her physical or mental powers, or both, which you believe from the whole evidence to have been brought upon her by reason of such injuries.[79]

(b) If you believe from the evidence that, by reason of the said collision of said passenger train with said switch engine, the plaintiff received any of the injuries complained of by him in his petition, and that by the use of such care by the railway company or its servants as would have been used by a very prudent, cautious and competent person under similar circumstances, said collision would not have occurred, you will find for the plaintiff such sum of money as you may find and believe from the evidence to be a fair and reasonable compensation for any physical and mental pain which, from the evidence, you may find that he has suffered or may probably hereafter suffer by reason of such injury or injuries, and for any future impairment of his health or mind, if, from the evidence, you should find and believe there will be any such future impairment as the direct result and consequence of such injury or injuries, and for any impairment of his capacity to labor and earn a livelihood for himself and his family, if, from the evidence, you should believe

77—Cotant v. Boone S. Ry. Co., 125 Iowa 46, 99 N. W. 115 (117).

78—Stowe v. La Conner T. & Trans. Co., 39 Wash. 28, 80 Pac. 856 (858), 81 Pa. 97.

"Waiving the question whether this statement of the law is technically correct as applied to damages 'for loss of time and care in business,' this portion of the charge, when coupled with the further instruction that, if the jury found for the respondent, they should award him such amount as would justly, fairly, and fully compensate him for the loss of time, if any, etc., could not mislead the jury, or operate to the prejudice of appellant."

79—Pumorlo v. City of Merrill, 125 Wis. 102, 103 N. W. 464 (468).

"It is complained it was error to include any damages for impairment of her mental powers. There was evidence that plaintiff's spine was affected, and that this difficulty extended into the neck, and caused much pain in the neck and head, and that she suffered much from severe headaches, and that she was often afflicted with coma. We find the instruction was justified by the evidence."

that there has been any such impairment as a result and consequence of such injury or injuries.[80]

§ 907. **Impairment of Mental Faculties and General Health.** The jury are instructed, that if they find the defendant guilty, under the testimony and instructions of the court, then in assessing the plaintiff's damages, the jury may take into consideration not only the bodily disability occasioned by the accident, if any is proved, but also any impairment of plaintiff's mental faculties and general health, if any such is proved, and which the jury believe, from the evidence, will affect or impair his future ability to attend to his ordinary business the same as if the injury complained of had not occurred.[81]

"The court instructs you that if, through any negligence of the carrier or its employes a passenger is injured without any fault or negligence on his part, then such carrier becomes liable for all damages that such passenger may suffer on account of injuries so received or that are directly and proximately traceable to such injuries which would be reasonable compensation for the pain and suffering arising to him from such injuries as well as for all permanent injuries to him or to any portion of his body or the permanent impairment of any of his organs and for any injury to his mental faculties caused by such injuries, and in this connection if you find for the plaintiff in this action you may consider the evidence, if any, relating to the plaintiff's mental faculties, and if you find that the plaintiff's mind or his mental faculties were injured or permanently impaired by reason of said injuries, then you may consider damages therefor, and in estimating such damages you should consider the degree of probable permanent injury to plaintiff's mind and to what extent such impairment of plaintiff's mental faculties, if any, lessens plaintiff's capacity for performing equally as remunerative employment as before such injuries; and if you find that his capacity for obtaining employment or earning a livelihood has been lessened by reason of such injuries to his mind or to his mental faculties, then you may estimate how much less the plaintiff will probably earn for the balance of his life by reason of such injuries and allow the plaintiff therefor."[82]

80—Cen. Tex. & N. W. Ry. Co. v. Luther, 32 Tex. Civ. App. 309, 74 S. W. 589.

"We do not think the jury could have been misled by the language of the charge into giving double damages for the same loss, and hence the criticism made on the charge is not tenable."

81—Ill. C. R. Co. v. Reed, 37 Ill. 484; Morris v. C. B. & Q. R. Co., 45 Ia. 29.

82—Cole v. Seattle R. & S. Ry. Co., 42 Wash. 462, 85 Pac. 3.

"If any decrease in the respondent's mental vigor and ability, impairing his capacity to earn money, was caused by his injuries, it was certainly proper for the jury to consider such condition in estimating the damages to be awarded. There was evidence tending to show a decrease in his earning capacity by reason of the lack of his former mental vigor. Without entering into a detailed statement of such evidence, we think it sufficient to warrant the giving of this instruction, which, upon the facts shown, was not erroneous."

§ 908. **Impairment of Physical and Nervous System and Memory, etc.—Horse and Cart Also Damaged.** (a) If you find that plaintiff is entitled to a verdict, then the amount of your verdict, if any, should be such sum of money as, in your best judgment, with the light of the testimony before you, will be a reasonable pecuniary compensation to plaintiff for all such physical pain, if any, and mental suffering, if any, and impairment of his nervous system, if any, and impairment of his memory, if any, and impairment of his ability to earn money, if any, and expense, if any, incurred by plaintiff for the reasonable value of such services of a physician as it may have been reasonably necessary for him to incur for the treatment of the wound on his head as plaintiff may have sustained as the direct result of the injuries sustained by him in falling off of said car on the ..... day of....., 190...[83]

(b) In assessing damages to plaintiff, should the jury decide that he is entitled to any, the jury should take into consideration the damage to his horse and cart, the pain and suffering undergone by plaintiff, his loss of time and injuries that he sustained to his physical and nervous system, if any; and if the jury find that plaintiff is entitled to damages they should take into consideration the permanency of his injuries, if they find from the evidence that his injuries are permanent, and give him such damages as they may believe from the evidence will fairly compensate him for the injuries sustained, not to exceed the sum of $15,000.[84]

If you find for the plaintiff, you will assess its damages at such sum, not exceeding ———— dollars ($————), as will reasonably compensate plaintiff for the damage to plaintiff's horse and harness, and for plaintiff's expenses for medical services, feed, care and attention to said horse, and for the loss to plaintiff from being deprived of the use of said horse. If you find for the defendant, you will simply so state in your verdict.[85]

§ 909. **Damages Limited to Injuries Alleged in Complaint—Fright, Mental Suffering or Nervous Shock Must Be Result of Injury to Be**

83—Nor. Tex. T. Co. v. Yates, — Tex. Civ. App —, 88 S. W. 283.

"Appellant's contention is that the charge quoted is misleading, confusing, and authorizes a double recovery, for the same injuries. The alleged vice in the charge, according to appellant's contention, arises from the authority given to the jury to allow compensation for impairment of his nervous system and impairment of his memory in addition to the compensation the jury are authorized to allow appellee on other grounds stated in the charge. We do not think appellant's contention is sound. We are of the opinion that appellee, under his pleadings and the evidence, was entitled to compensation for impairment to his nervous system and memory, independent of and in addition to the compensation he was entitled to upon the other grounds stated in the charge. And therefore, there was no error in the court so instructing the jury. G. C. & F. & S. Ry. Co. v. Warner, 22 Tex. Civ. App. 167, 54 S. W. 1064; Railway Co. v. Boehm, 57 Tex. 152; Railway Co. v. Greenlee, 62 Tex. 344; Railway Co. v. Randall, 50 Tex. 261."

84—Twelkemeyer v. St. L. T. Co., 102 Mo. 190, 76 S. W. 882.

85—Sanitary Dairy Co. v. Transit Co., 98 Mo. App. 20, 71 S. W. 726 (727).

Recoverable. The plaintiff can only recover, if at all, for the injuries described in the complaint, and cannot recover for other or different injuries; nor can he recover for fright or mental suffering or nervous shock, unless they grow out of and were the result of the personal injuries received, if you find he received any.[86]

§ 910. Nervous Prostration, Induced by Dwelling Upon Her Claim Against Railroad, Not to Be Considered—Past and Present Pain, Mental or Physical, Allowable—Limitation of Rule. If you come to that question, you will give her as damages so much money as will fully compensate her for all loss of time and money she has or may hereafter suffer, and for all the pain, both physical and mental, which she has or may hereafter endure, as the direct, natural, and probable result of the defendants' fault, as the evidence discloses it to you. If you find that she has nervous prostration, induced by dwelling upon her claim against the railroad, and on the probable result of her suit, you will not consider it in assessing her damages. In assessing her damages, you will only consider the physical injury she actually received, and mental pain and suffering which resulted directly from the injury. You will not consider any fictitious pain and suffering due to a disordered imagination for she can only recover for actual, and not imaginary, pain.[87]

§ 911. Should Consider Age and Condition in Life—Mortality Tables—Sound Judgment and Discretion of Jury—Only Compensatory Damages. (a) She is also entitled to compensation for all

86—Terre H. E. Ry. Co. v. Lauer, 21 Ind. App. 466, 52 N. E. 703 (706).

"The standard dictionaries define the word 'bodily' to mean 'pertaining to or concerning the body; of or belonging to the body or to the physical constitution; not mental, but corporeal,'—and the word 'personal' as pertaining to the person or bodily form. The expression 'great personal injury' has been said to be equivalent to the expression 'great bodily harm.' 2 Abb. Law Dict. p. 273. A personal injury is an injury to the person of an individual, as an assault is distinguished from an injury to one's property. 2 Rap. & L. Law Dict. p. 955. If we admit, as claimed by appellant, that the terms 'personal injuries' and 'bodily injuries' are not 'necessarily equivalent,' yet the jury could only have understood from above instruction given that the appellee was entitled to recover only for mental suffering growing out of the bodily injuries he received."

87—Walker v. Boston & M. R. R., 71 N. H. 271, 51 Atl. 918.

"The requested instruction was, so far as applicable to the evidence covered by the instructions given. Upon the question of damages for future physical and mental pain, the jury were limited by the instructions given to such suffering as was shown to be the direct, natural, and probable result of the defendant's fault. When the legal principle governing a case is fully stated in general terms, it is not error of law for the court to refuse instructions upon its application to particular evidence. The substance of the requested charge having been given, it is no ground of exception that it was not repeated, or that a particular form of expression was not used. Rublee v. Belmont, 62 N. H. 365; Chase v. Chase, 66 N. H. 588, 592, 29 Atl. 553. There was evidence that the plaintiff was suffering from partial mental disability. If, as the result of mental disability induced by the defendant's fault the plaintiff suffered from apprehension of insanity, such suffering was an element of her damages."

the pain and suffering which she has endured since the time of the accident, and that she is likely to endure in the future. In considering this question you have a right to consider her age. At the time of the injury, she was thirty-six years of age, and, in accordance with the mortality tables of the state of Michigan, she has an expectancy of life of thirty-one years and upwards. In computing the amount which she would earn during that period, it is your duty to give her the present worth or value of what she would earn.

(b) I might add that, in computing the damages that a person is entitled to for pain and suffering, the law has no standard by which to go. It is left to the sound judgment and discretion of the jury. It is not an arbitrary power left to the jury, to be exercised arbitrarily. You have no right to award anything in the nature of punishment. You must try and make the person injured through the negligence of the defendant whole, so far as money consideration can do so, but you should give nothing further than compensation.[88]

(c) You may consider the age of the plaintiff and his reasonable expectation of life, which is shown by the evidence to be 36 years. Also his habits of industry and temperance. You should also consider the contingencies of a much shorter life. The plaintiff may not live to the full period of expectancy.[89]

(d) If you find for the plaintiff, you will, in assessing her damages, take into consideration her age and condition in life, the injury sustained by her, the physical pain, mental anguish, and the impairment of her capacity and ability to earn a livelihood, if any, suffered by her because of said injury, and such damages, if any, of the nature above specified, as you believe from the evidence she will sustain, in the future, and the direct effect of said injury, and assess the same in such amount as, under all the facts and circumstances shown in evidence, will be just and reasonable compensation to the plaintiff, not exceeding the sum of .....[90]

§ 912. **Shortening of Life Not an Element of Damage, but May Be Considered In Determining Extent of Injury.** (a) If you find for the plaintiff and award him damages, in fixing the amount of same you cannot allow him anything for loss or shortening of life itself; but, if you believe from the evidence that shortening of life may be the result of the injury, this may be considered in determining the extent of the injury only, and the consequent disability to make a living and the mental and bodily suffering which may result.[91]

88—Beattie v. Detroit, 137 Mich. 319, 100 N. W. 574 (577).

"Taking the charge as a whole, we do not think the jurors were misled. See Bailey v. Centerville, 108 Iowa 20, 78 N. W. 831. As to the use of the mortality table, see Nelson v. L. S. & M. S. Railway Co., 104 Mich. 582, 62 N. W. 993."

89—Kinney v. Folkerts, 84 Mich. 616, 48 N. W. 283. The injured was at the time of the accident 29 years of age.

90—Heinzle v. Met. St. Ry. Co., 182 Mo. 528, 81 S. W. 848 (853).

91—Muncie Pulp Co. v. Hacker, — Ind. —, 76 N. E. 775.

"If this instruction authorized

(b) If you find for the plaintiff, in estimating the damages which she may recover the court instructs you that she is not entitled to recover anything whatever for shortening her life, but you may consider that fact, if you find it to be a fact, in determining the extent of her injury.[92]

damages for the shortening of life, it was erroneous, Richmond G. Co. v. Baker, 146 Ind. 600, 45 N. E. 1049, 36 L. R. A. 683. But in that case the doctrine seems to be approved that, if the condition of the injured person is such that a shortening of life may be apprehended, this may be considered in determining the extent of the injury. The instruction under consideration is thus limited, and manifestly did not mislead the jury, as in an answer to an interrogatory the jury state that they allow appellee nothing for the reason that they believe the injury for which he sues will shorten life."

92—Cleveland C. C. & St. L. Ry. Co. v. Miller, 165 Ind. 381, 74 N. E. 510-511.

"Preliminary to a discussion of this instruction it is proper to call attention to some of the other instructions upon the subject of damages. The court instructed the jury that only compensatory damages could be awarded. The jury was advised that it was its 'duty to exclude an allowance of any sum for sickness, pain, or suffering which is not shown by the evidence, with reasonable certainty, to be directly traceable to the alleged negligence of the defendant.' There was also a direction not to 'award damages for remote, uncertain, and indirect results of the alleged fall of the plaintiff.' It is in the light of these instructions that the instruction complained of is to be judged. In Richmond, etc. Co. v. Baker, 146 Ind. 600, 45 N. E. 1049, 36 L. R. A. 683, it was held that the fact that the life of the plaintiff would be shortened did not authorize an award of damages therefor, but in the course of the opinion, the court said: 'If the condition of the injured person is such that a shortening of life may be apprehended, this may be considered in determining the extent of the injury, the consequent disability to make a living, and the bodily and mental suffering which will result. This however, falls far short of authorizing damages for the loss or shortening of life itself.' It is argued by counsel for appellant in this case that the instruction under consideration illogically authorized the jury to consider, in forming a basis for damages, that which must be omitted when the damages are assessed. It is evident that it was in the light of the language of the above decision that the court framed the instruction complained of. We are of the opinion that it was not calculated to mislead the jury. The jurors were told with the greatest distinctness that the plaintiff was not entitled to recover anything for the shortening of her life. The consideration of that fact, if the jury found it to be such, was not for the purpose of determining her damages, but was limited to the purpose of 'determining the extent of her injury.' It can only be inferred from the instruction that, although there could be no allowance for the shortening of the plaintiff's life, yet, if the jury found that such a result would follow from the injury, it was not debarred from a consideration of the illness and suffering which ordinarily attend as consequences upon an injury so grave. While, for obvious reasons, a plaintiff cannot recover for the shortening of his life, yet we know of no reason why he may not recover, as and for his damages in life, a sum sufficient to compensate him for the extra burden of suffering which a jury may conclude, as a matter of sound discretion under the evidence, will approximately be occasioned by the negligence of the defendant. See Phillips v. London, etc., R. Co., 5 C. P. D. 280, 291. We have studied the instruction complained of, very carefully, and while we cannot commend it as a model, we think that, keeping in mind its predominant assertion that the plaintiff 'was not entitled to recover anything whatever for the shortening of her life,' the criticism of the qualifying clause appears to be verbal and superficial. In the absence of anything in the instruction which directly countenanced

§ 913. **What Jury May Consider in Assessing Damages—Standard Life and Annuity Tables Competent Evidence to Assist Jury.** (a) If the jury find from all the evidence that the defendant company is liable to the plaintiff for any actual damages for the injuries sustained by him, then, in fixing the amount of the damages, they may consider his loss of time, the expense incurred by plaintiff by reason of his injury, the physical and mental pain and suffering which he has already endured by reason of his injury, and also that which he is likely to experience in the future by reason of such injury, the impairment of his health and powers of locomotion resulting from his injury, and also that which he is likely to sustain in the future by reason of such injury; and, in this connection, standard life and annuity tables showing the probable duration of life and the present value of a life annuity are competent evidence to assist the jury in making their estimate of the damages.[93]

(b) Certain mortality tables have been admitted in evidence for the purpose of showing the number of years a man of plaintiff's age may expect to live. If you believe from the testimony that the plaintiff has been permanently injured, then you may refer to these papers to ascertain the number of years which a man of plaintiff's age may be expected to live. Then ascertain from this what his earning capacity is for one year. If his earning capacity has been diminished, then take the proportion of what he could have earned, and multiply it by the number of years of his expectancy. I suggest here, gentlemen, that these tables are given to you for the purpose of your making calculations. You take his earning capacity at the time he was injured, and multiply it by the number of years

the idea that under the guise of determining the extent of appellee's injury, the jury might allow for an element which the court had just emphatically said could not be allowed for, we cannot indulge the supposition that the jury drew the inference that in the same breath the court was contradicting itself. In the consideration of an instruction the initial point of inquiry is, was the jury misled? See Union Mut. Life Ins. Co. v. Buchanan, 100 Ind. 63; Caldwell v. N. J. Steamboat Co., 47 N. Y. 282; Thompson, Charging the Jury, 131. A case ought not to be reversed merely because it is obnoxious to verbal criticism, Lake S. etc. R. Co. v. McIntosh, 140 Ind. 261, 38 N. E. 476; Baltimore etc. R. Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624; So. etc. R. Co. v. Jones, 56 Ala. 507; People v. Bruggy, 93 Cal. 476, 29 Pac. 26; Thompson, Charging the Jury, 126. It was said by Church, C. J., in Caldwell v. N. J. Steamboat Co., supra: 'If the language employed is capable of different constructions, that construction will be adopted which will lead to an affirmance of the judgment, unless it fairly appears that the jury were, or at least might have been, misled.' It is not necessary, however, to go as far as this to uphold the result as against the strictures of counsel upon the charge of the court. We cannot regard as really ambiguous an instruction which can only be made to appear so by a process of verbal refining concerning a minor and qualifying phrase, where to do so would bring it in conflict with the principal proposition of the instruction which is expressed in language that does not admit of mistake."

93—Brasington v. South Bound R. Co. 62 S. C. 325, 40 S. E. 665 (669), 89 Am. St. Rep. 905.

he was expected to live, and then make such adjustment of the difference between his earning capacity now, if it is a permanent injury, and his earning capacity at the time he received the injury, if any, he received, and multiply that by the number of years he is expected to live. Take that sum of money which, placed at interest at seven per cent, for the number of years of his expectancy, would be the amount of principal and interest to the sum so found. And this will be the proper manner of arriving at the amount to which he would be entitled, but this is not conclusive upon the jury. It is submitted to you, to be considered by you, in connection with other testimony, to arrive at the amount of damages. You may consider in connection with the evidence the fact that the plaintiff's declining years during the time of his expectancy, and his diminished capacity for earning money by reason thereof, his liability to sickness, and the probability of his earning capacity being diminished by other causes during such time. And on the other hand, you may consider whether or not the earning capacity may be increased by his greater experience in the business during such time. All these circumstances may be considered by the jury in arriving at what would be the proper amount of damages.[94]

§ 914. Plaintiff Suffering From Disease at Time of Injury—Hastening Development of Disease. If you find from the evidence that the plaintiff received the injury complained of by reason of defendant's negligence alleged in the complaint, and at the time of the reception of said injury the plaintiff was suffering from some disease, and you further find that said injury hastened the development of such disease, and that thereby, without the fault of plaintiff, her present condition, whatever you may find that to be, has resulted from such injury, then I instruct you that the plaintiff is entitled to recover such damages as you may determine she has sustained from the injury.[95]

94—City of Columbus v. Sims, 94 Ga. 483, 20 S. E. 332.

95—Campbell et ux. v. Los Angeles T. Co., 137 Cal. 565, 70 Pac. 624 (625).

"One of weak physical structure, or small vitality, or in ill health, has as much right to protection from violence as a robust athlete; and in either case the physical injury, the bodily harm, which is actually caused by the violence, whether he be strong or weak, healthy or sickly, is the natural consequence of the wrong, and need not be specially averred. The law on this subject is correctly stated in Sedg. Dam. (8th Ed.) Par. 111, as follows: 'For instance, an assault and battery may directly result in pain and bruises, and in the aggravation of a pre-existing disease. These are the direct results of the battery. It may also result in the loss of time, expense of medical attendance, and loss of a business situation. These are perhaps direct results of the illness caused by the battery, but they are the indirect results of the battery itself.' The subject is fully discussed in Heirn v. McCaughan, 32 Miss. 17, 66 Am. Rep. 588, and in the notes to that case in 66 Am. Dec. 588. In that case the court says: 'The condition of the plaintiff's health is not alleged to be the special ground of the wrong, but it was proved on the trial as a circumstance of aggravation of the wrong, and to show how grievously the act, which was wrongful in itself, operated to the bodily distress of the plaintiff and

§ 915. **Injury Attributable to a Diseased Condition in Whole or Part.** If you find from the evidence that the plaintiff was diseased at and before the punishment complained of, and that her present condition is attributable to such former diseased condition and not in any manner or part attributable to such punishment, then you must find for the defendant. If you find that the plaintiff was diseased at and before the punishment she received, if any, but that by the punishment her disease has been aggravated or intensified, then you will give her damages for just such injuries as she has sustained, which were the result of the punishment.[96]

§ 916. **If Injured Was in Bad Health Before the Fall in the Street, Recovery can Only Be Had for Aggravated Injuries Occasioned by Such Fall.** (a) The jury is instructed that if the defendant should, under the charge, be held liable to the plaintiff in any amount for any injuries sustained by his wife, that the defendant could only be held responsible in law for such injuries, if any, as were the direct and proximate result of plaintiff's wife falling in the street; and if you find and believe that the wife of plaintiff was in bad health, and that her generative organs would naturally have been affected from child-bearing or other natural causes, or the condition of her health at the time of her injuries, notwithstanding the same may have been aggravated by the fall on the street, you can only find for plaintiff to the extent that her troubles were aggravated by such fall; and in your consideration of the liability of defendant you are absolutely restricted to this measure for the recovery of any damages, not being allowed to consider against the defendant or to charge the defendant with any pain or injury or suffering, if any, caused to plaintiff's wife by reason of other causes than the fall in the street.[97]

(b) The court instructs the jury that if from the evidence and under the instructions of the court you find the issues herein in favor of the plaintiff, then, although you may believe from the

his wife. This was entirely competent under the pleadings. Sedg. Dam. 210.' The same rule was substantially announced by this court in Sloane v. Railway Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193. In that case a female passenger was wrongfully expelled from the cars, and the court held that 'evidence is admissible to show her nervous condition, and that she was subject to insomnia and nervous shock and paroxysms if placed under great mental excitement connected with the humiliation of her expulsion from the car, there had been a recurrence of the insomnia and nervous paroxysms;' and further the court said: 'It is immaterial whether the defendant or its agents knew of the susceptibility of the plaintiff to nervous disturbance, and it is not for the defendant to say that, because it did not or could not, in fact, anticipate such a result of its negligent act, it must be exonerated from liability for such consequences as ensued; and it must be taken to know and contemplate all the natural and proximate consequences not only that certainly would but that probably might, flow from its wrongful act.' We quote from the syllabus which correctly states the decision."

96—L. N. A. & C. R. Co. v. Jones, 108 Ind. 551, 9 N. E. 476; Treschman v. Treschman, 28 Ind. App. 206, 61 N. E. 981 (965).

97—City of Dallas v. Moore, 32 Tex. Civ. App. 230, 74 S. W. 95 (97).

evidence that the plaintiff was at and before the time of the accident herein complained of suffering from any sickness or disability, still if you further believe and find from a preponderance of the evidence that he was injured by and through the negligence of the defendant, as charged in the declaration, and that such injuries, if any, developed and aggravated his previous sickness and disability, if any, then the jury, in assessing plaintiff's damages, if any, have the right to and they should take into consideration such increased suffering, sickness and disability, if any, that the jury may believe from the evidence before them in this case plaintiff has sustained, and in the future may sustain, if any, on account of such increased sickness and disability, if any.[98]

§ 917. **Injuries Aggravating Former Diseased Condition.** (a) If you find from the evidence that the plaintiff was diseased at and before the accident, and that her present condition is attributable to such former diseased condition, and not in any manner or part attributable to the injuries received in the railroad accident, and that plaintiff in fact received no injuries from said accident, then you would have to find for defendant. If you find that the plaintiff was diseased at and before the accident, but that by the accident her disease has been aggravated or intensified, then you will give her damages for just such injuries as she has sustained, which are the result of the accident. If you find from the evidence that plaintiff, prior to the accident, was sound and free from disease, and that by reason of the injury received in the accident she has become crippled, diseased, disabled and permanently injured, then you will assess such a sum as will compensate her fairly for the injuries thus sustained.[99]

98—Chi. U. T. Co. v. Browdy, 108 Ill. App. 177 (179), approved 206 Ill. 615.

99—L. N. A. & C. Ry. Co. v. Jones, 108 Ind. 551, 9 N. E. 476 (485). "The first objection urged to this instruction is that it assumes that appellee was injured. In answer to that, it is sufficient to say that other instructions left it to the jury to determine as to whether or not appellee, without any conflict, shows that she was injured. See Koerner v. State, 98 Ind. 7-13. The only other objection that challenges attention is limited to that portion of the instructions with reference to the aggravation of an existing disease. It is most earnestly contended by appellant's counsel in a lengthy argument which shows thought and research, that appellant cannot be held liable for the aggravation of an existing disease, although that aggravation was the result of its negligence and the injury appellee thereby received. In other words, their position is that if, at the time of the injury, appellee was in any way suffering from, and was to any extent disabled by, an existing disease, and her sufferings were intensified, and her disablement increased, by the injury, she cannot recover for such additional suffering, and increased disablement, because the injury was not the proximate and sole cause thereof. The argument is based upon the familiar maxim, causa proxima et non remota spectatur. We do not think it would be profitable in this case to extend the opinion in a review of the numerous cases cited by counsel, and in an examination of the arguments advanced, as the question here involved has been examined at length and decided by this court in recent cases, one of which has been decided since the filing of appellant's brief. Under those decisions, the law is correct-

(b) If under the foregoing instructions you find for plaintiff, you will allow him such sum as you may believe from the evidence will as a present cash payment, reasonably and fairly compensate him for the physical and mental pain, if any, he has suffered in the past, or which you may believe it is reasonably probable that he will suffer in the future, as a result of such injuries, if any; and also for the reasonable value of his services for the time he has lost, if any; for his diminished capacity to labor and earn money, if any, in the future; also for the reasonable value of his expenses necessarily incurred for doctor's bills, if any, by reason of his injuries, if any. But in this connection you are instructed that if you should believe from the evidence that plaintiff's mental and physical pain, if any, he suffers or has suffered, or the impaired condition of his health, if any, at this time or heretofore, are the results of injuries, if any, which you may believe from the evidence he received prior to the time alleged in his petition, you are instructed that plaintiff would not in any event be entitled to recover in this case for any such mental or physical pain or impaired health as you may believe to be the result of former injuries.[100]

(c) The court instructed the jury that, in considering the extent of the plaintiff's injuries and his physical condition, you may consider the fact that plaintiff, prior to the accident, had had rheumatism. If you believe his subsequent ailments, in whole or in part, resulted therefrom, you are instructed that plaintiff was bound to use all means within his power to effect a cure of himself from the injuries received in the accident, and if he has not done so, and has neglected to properly treat himself, then he cannot recover for any condition due to such neglect; and, in considering the element of damages based on account of loss of time, you will consider the nature of his employment as a railroad conductor, and cannot allow for loss of time sued for since the commencement of the action, to-wit, December 15, 1898, but may consider the fact, if proven, of impairment of earning capacity.

(d) The court instructs the jury that, although you may believe that the plaintiff has a misplaced heart, and that his liver is not in its natural position, yet, before you can consider these facts as an element of damages, it must be proven to your reasonable satisfaction

ly stated in the instructions under consideration. Terre Haute & I. R. R. Co. v. Buck, 96 Ind. 346, 49 Am. Rep. 168, and the numerous cases there cited; L. N. A. & C. Ry. Co. v. Falvey, 104 Ind. 409, 426, 3 N. E. Rep. 389, and 4 N. E. Rep. 908, and the cases there cited."

100—Mo. K. & T. Ry. Co. of Texas v. Hay, — Tex. Civ. App. —, 86 S. W. 954 (955).

"It is contended that this charge is erroneous in failing to limit plaintiff's recovery for services lost and expenses incurred for doctor's bills incurred on account of the particular injuries mentioned in the petition. This contention is not sound. The question of former injuries was matter of defense, and, if appellant desired a more comprehensive charge, it should have requested the same. Queen Ins. Co. v. Jefferson I. Co., 64 Tex. 583; T. P. Ry. Co. v. O'Donnell, 58 Tex. 42; Milmo v. Adams, 79 Tex. 530, 15 S. W. 690."

that these conditions were caused by the wreck, either directly or indirectly, and that the wreck is due to the negligence of the defendant, as explained in the other instructions.[1]

(e) If you find that the plaintiff had been injured in his back prior to the time he claims to have been injured at C, or that he had any disease of the back prior to that time, and that he was suffering therefrom at the time of the alleged accident at C, and you further find that he was injured in the back at C while alighting from the train, and that the defendant is responsible for such injuries, and that the injuries received at C simply aggravated or increased his existing trouble, then the plaintiff would be entitled to recover, if at all, under the other instructions given you, only for the increase or aggravation of the troubles which existed at the time he received such injuries at C.[2]

§ 918. **Past and Future Mental Suffering on Account of Disfigurement of Person, Element of Damage.** (a) The court instructs the jury that, if the plaintiff is entitled to recover at all, she is entitled to such sum as will fully compensate her for all bodily pain and suffering which she has endured in the past by reason of the injuries received, and for such bodily pain and suffering as the evidence shows she will endure in the future. She is also entitled to recover for such mental suffering as she has endured in the past by reason of the insult, wrong and indignity upon her, if any, and by reason of her consequent physical impairment, and for mental suffering in the future, if any, by reason of such physical impairment, if you find that the evidence shows that there will be physical impairment in the future.[3]

(b) And if you are satisfied from the evidence that the injury that the plaintiff has suffered is permanent in its nature, and will continue to affect his health and physical condition in the future, and cause him pain and suffering in the future, you should allow him, in addition, such sum as will reasonably compensate him for such pain and suffering and impairment of ability to earn a livelihood as he must suffer in the future.[4]

(c) If you find for the plaintiff, you will allow him a fair compensation for the loss of time from his business or occupation; his loss of capacity, if any, for the performance of the kind of labor for

1—Copeland v. W. R. Co., 175 Mo. 650, 75 S. W. 106 (110).

2—S. L. S. W. Ry. Co. v. Johnson, — Tex. —, 97 S. W. 1039.

3—Nichols v. Brabazon, 94 Wis. 541, 69 N. W. 342.

"Mental suffering on account of disfigurement of the person, or impairment of the use and symmetry of the limbs, have often been held to be elements proper to be considered in assessing the amount of compensatory damages for personal injuries. Sedg. Dam. (8th Ed.) Para. 47, Subd. 6; Sherwood v. C. & W. M. R. R. Co., 82 Mich. 374, 383, 46 N. W. 773; Heddles v. C. & N. W. Ry. Co., 77 Wis. 228, 230, 231, 46 N. W. 115, and cases cited."

4—Kenyon v. City of Mondovi, 98 Wis. 50, 73 N. W. 314.

"If a jury are satisfied of the existence of a fact, it would seem that they must be reasonably certain of it. We see no defect in the instruction."

which he is fitted; the disfigurement of his person, if any; and for the pain and suffering resulting from said injury.[5]

(d) If you find from the evidence that the plaintiff is entitled to recover, as alleged in his declaration, then in estimating the plaintiff's damages, you may take into consideration his health and physical condition prior to the injury, and also his health and physical condition since then, if you believe from the evidence that his health and physical condition since then is impaired as the results of such injury; and you may also consider whether or not he has been permanently injured, and to what extent; and also to what extent, if any, he has been injured, and to what extent, if any, he may have endured physical and mental suffering as a natural and inevitable result of such injury; and also any necessary expenses he may have been put to in and about caring for and curing himself; and you may consider what, if any, effect such injuries may have upon him in the future in respect of pain and suffering; and you should allow him as damages such sum as, in the exercise of a sound discretion, you may believe from all the facts and circumstances in evidence will be a fair and just compensation to him for the injuries so sustained.[6]

§ 919. **Pain and Anguish of Body and Mind—Eyesight or Hearing Impaired, etc.** The court instructs the jury that if they find

5—McGee v. Smitherman, 69 Ark. 632, 65 S. W. 461 (463).

"If the instruction of the court was too general, the appellants could not complain. They did not ask for a more specific instruction. 'That the court's charge was general in its terms is no ground for reversing a judgment, if no request was made for a more specific charge.' Fordyce v. Jackson, 56 Ark. 594, 20 S. W. 528, 597."

6—W. C. St. R. R. Co. v. Lups, 74 Ill. App. 420 (425).

"Appellant's counsel contend that this instruction is erroneous in so far as it relates to future pain and suffering. The instruction informed the jury that they might consider to what extent, if any, appellee may have endured physical and mental suffering as a natural and inevitable result of his injury, etc. This was proper. In H. & St. J. R. R. Co. v. Martin, 111 Ill. 219, and City of Chi. v. McLean, 133 Ill. 148, 24 N. E. 527, instructions of a similar character but more favorable for the plaintiffs than the instruction in question is for appellee, were held unobjectionable."

From the comment of the court, it appears the question of "marred in his personal appearance" was not raised, but see C. & G. T. Ry. Co. v. Spurney, 69 Ill. App. 549 (552), aff'd 197 Ill. 471, 64 N. E. 302, where the court commented as follows:

"At the instance of the plaintiff the jury were instructed that in determining the amount of damages they might take into consideration 'any future bodily and mental pain or suffering, or future inability to labor or transact business, if any, that the jury believe from the evidence the plaintiff will sustain by reason of injuries received.'

"Future mental pain, that is, mere humiliation and grief resulting from a contemplation of a maimed and disfigured body, is not an element entering into an ascertainment of the pecuniary damage one has sustained as the result of negligence. I. C. R. Co. v. Cole, 165 Ill. 334, 46 N. E. 275; Peoria B. A. v. Loomis, 20 Ill. 235, 71 Am. Dec. 263; C. B. & Q. R. R. Co. v. Hines, 45 Ill. App. 299."

See vol. 3, case of City of Decatur v. Hamilton, 89 Ill. App. 561, also Cullen v. Higgins, 216 Ill. 78, 74 N. E. 698, where the court held it was error to use the words "marred physically" in an instruction on measure of damages. See

for the plaintiff they will assess his damages at such sum as they may believe from the evidence will be a fair compensation for the pain and anguish of body and mind that he has suffered, caused by the negligence and carelessness of the agents and servants of the defendant, including his expenses for medical services and medicines, and the impairment of his eyesight and hearing, if you find that his eyesight or hearing has been impaired by the injuries he sustained, and for loss of time from his business, if you believe from the evidence that the injury caused him to lose any time from the transaction of his business, and for any impairment in his physical capacity in the future to attend to any active business, if you find that any such incapacity exists, and that such impairment was caused by the injuries sustained.[7]

§ 920. Ears Impaired—Object of Ridicule—Rule of Damages. The court instructs you that if a person or corporation negligently causes an injury to another who is without fault, which makes the latter an object of pity to his fellow men and an object of ridicule to the thoughtless and unfeeling and deprives him of the comfort and companionship of his fellows, should respond in damages for the injury sustained. Therefore if you find for the plaintiff and further find that among other injuries either or both of his ears were impaired at the time so that his hearing is impaired and a considerable degree of deafness has ensued which is more or less permanent, and as a consequence the plaintiff's ability to gain remunerative employment has been lessened or decreased, then you may not only allow him such sum as damages therefor as in your sound judgment will reasonably compensate him for the difference between his lessened earning capacity on account of such deafness, if any, and what it would be if his hearing was not impaired, but also compensation for any probable distress of mind or mental suffering, if any, that he may endure by reason of having such deafness.[8]

also Sutherland Dam. (3d Ed.), § 1244, for an interesting discussion of this important subject.

7—Shanahan v. St. L. T. Co., — Mo. —, 83 S. W. 783 (785).

"The personal testimony of the plaintiff betrays material and grave impairment of his senses, if not his intelligence, and the infirmities of sight and hearing, or at least their aggravation, he directly attributed to the disaster, and it was for the jury to determine whether his belief was justified under the evidence presented. It was apparent from the testimony that at the time of the injury, and for a considerable period preceding, plaintiff had no definite occupation, but collected the rental of his realty and superintended the repairs necessary thereon, and that his son had succeeded him, without compensation, in such affairs during his disability; and no testimony was introduced respecting the value, if any, of plaintiff's time, or from which the jury could allow him any compensation for loss of time from his business. Haworth v. K. C. So. Ry. Co., 94 Mo. App. 215, 68 S. W. 111. The petition prayed for but $100 in return for time lost from and injury to his individual affairs, and in cases of personal injuries probably permanent and lasting in their results such as plaintiff asserted, and the proof inclined to show, where his injuries, the principal and chief damages to be redressed were the physical pain and mental suffering, past and future, and the permanent impairment of his physical condition."

8—Cole v. Seattle, R. & S. Ry.

§ 921. **Damages for Mental Suffering Apart from Physical Injury.** You are instructed that damages cannot be recovered for mere mental suffering, disconnected from physical injury, and not the result of the willful wrong of the defendant.[9]

§ 922. **Should Consider Whether Injury Is Permanent, etc.** (a) The jury are further instructed, that, if under the evidence and the instructions of the court, they find the defendant guilty, then, in estimating the plaintiff's damages, if any are proved, they have a right to take into consideration the personal injury inflicted upon the plaintiff—the pain and suffering undergone by him in consequence of his injuries, if any are proved, and also any permanent injury sustained by him, if the jury believe, from the evidence, that the plaintiff has sustained such permanent injury from the wrongful acts complained of.[10]

Co., 42 Wash. 462, 85 Pac. 3 (4).

"Although this instruction may be correct as an abstract principle of law, it is not applicable to the evidence in this case. Yet, notwithstanding this criticism, we fail to see how it constituted prejudicial error. The jury could not have been misled, as they saw respondent and knew his exact condition. No question was raised as to the fact of his injuries, nor as to the appellant's liability for damages."

9—Chase v. Telegraph Co. (Georgia), 44 Fed 554, 10 L. R. A. 464; Lewis v. Tel. Co., 57 S. C. 325.

In the latter case, in commenting, the court said: "The second exception relates to a subject which has occupied the legal mind for centuries, namely, whether damages can be recovered for mental suffering disconnected with, or in the absence of any bodily injury. It is not a new subject therefore. The common law never recognized such damages. They were too vague, shadowy and uncertain. The decisions of the Supreme Court of the United States and of a large majority of the state supreme courts refuse to sanction any change of the common law in this particular. There are a few of the supreme courts of the states of this Union which do uphold the doctrine that damages may be awarded for mental suffering disconnected with physical injury—such as Texas, Tennessee, North Carolina, Alabama and a few others. Our own state may be classed among those who adhere to the old common-law rule, as may be seen by examining Henning v. Withers, 3 Brev. 458; Hunt v. D'Orval Dud. 180; Tappan v. Harwood, 2 Speer 536; Pearson v. Davis, 1 McMul. 37; Edgar v. Costello, 14 S. C. 20; Sitton v. McDonald, 25 S. C. 68; Bridger v. R. Co., 27 S. C. 456, 3 S. E. 860, 13 Am. St. Rep. 653; Martin v. R. R. Co., 32 S. C. 592, 10 S. E. 960; Wallingford v. Telegraph Co., 53 S. C. 410, 31 S. E. 275; Mack v. S. B. R. R. Co., 52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913; Kennon v. Gilmer, 131 U. S. 21, 9 Sup. Ct. 696, 33 L. Ed. 110; Crawson v. W. U. Tel. Co., 47 Fed. Rep. 544 (Ark.); Chase v. W. U. Tel. Co., supra; Munro v. Dredging Co., 84 Cal. 515, 24 Pac. 303; I. O. Tel. Co. v. Saunders, 32 Fla. 434; Wyman v. Leavitt, 71 Me. 227; Connell v. W. U. Tel. Co., 116 Mo. 34, 22 S. W. 345; Connell v. W. U. Tel. Co., 42 N. Y. Supp. 1109; Kester v. W. U. Tel. Co., 26 Chicago Legal News, 252 (Ohio)."

See Int. & G. N. R. Co. v. Anchoda, — Tex. Civ. App. —, 68 S. W. 743, where it was held a proper element of damages.

Whether damages can be recovered for suffering without physical injury, is a question which has caused great discussion in the American courts. The early leading case on the subject is Victorian Ry Commissioners v. Coultas, 12 Vict. L. R. 895, an English case. This case has been widely discussed and both followed and repudiated by the American courts. For an exhaustive review of these cases, see 1 Sutherland on Damages, (3d Ed.) §§ 21-24; also Hughes' Procedure 1268, 77 Am. St. 859.

10—**Collins et ux. v. The City,**

(b) If, under the evidence and instructions of the court, the jury find the defendant guilty, then, in assessing the plaintiff's damages, the jury may take into consideration not only the loss, expenses and immediate damage arising from the injuries received at the time of the accident, but also the permanent loss and damage, if any is proved, arising from any disability resulting to the plaintiff from the injury in question, which renders him less capable of attending to his business than he would have been if the injury had not been received.[11]

(c) In estimating the plaintiff's damages, you should also consider the nature of the injuries suffered, as to whether they are likely to prove permanent, or temporary only.[12]

§ 923. **Should Determine Whether Injury Is Permanent or Temporary—Consider All the Evidence with Respect to Injury to Person and Property—Mental Anguish, etc.—Pecuniary Point of View.** If you find the issues for the plaintiff you should consider the extent of the injury as it appears from the evidence, whether it is permanent or temporary. You have a right also to take into consideration the physical pain and mental anguish caused by the injury and the extent to which the plaintiff has been deprived of the capacity to earn a living or to cumulate money or other property. You have a right to take into consideration the injury to his property, the fact that his horse was killed, the injury to the wagon and the harness, if you believe from the evidence that they were injured, and, so considering all the evidence with respect to the injury of the plaintiff and his property as described in the complaint, you should give him such compensation as will remunerate him for the injury sustained. You must look at it in a pecuniary point of view, estimating his loss in money.[13]

§ 924. **Permanency of Maladies—Damages Restricted by Evidence in the Case.** (a) If the jury believe, from the evidence, that any portion or portions, feature or features, of the plaintiff's maladies resulting from the injury aforesaid is or are permanent, the jury may consider such permanent malady or maladies, and such detriment as they may believe from the evidence naturally, probably and reasonably may result therefrom to the plaintiff in his personal health and ability to labor, and, having considered these elements, fix the plaintiff's damages at such sum as the jury may believe, from the evidence, is necessary to adequately, fairly and justly compensate the plaintiff for the loss which the jury believe, from the evidence, is the direct natural, probable and proximate result or consequence of the injury aforesaid; but the jury in the assessment of

etc., 32 Ia. 324; Holbrook et al. v. The U. & S. Rd. Co., 2 Kern 236; Steamer N. W. v. King, 16 How 472; Russ et ux. v. Steamboat War Eagle, 14 Ia. 363.

11—Indianapolis v. Gaston, 58 Ind. 224; Morris v. Chi. etc., R. R. Co., 45 Ia. 29.

12—Union Gold Min. Co. v. Crawford, 29 Colo. 511, 69 Pac. 600 (603).

13—Rio G. W. Ry. Co. v. Leak, 163 U. S. 280 (283), 16 S. Ct. 1020.

damages must take into consideration only such elements of claim, damages or injuries, as they believe are established by the evidence in the case.[14]

(b) If you find for the plaintiff, you will be required to determine the amount of his damage. In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to, and they should, take into consideration all the facts and circumstances before them, the nature and extent of plaintiff's physical injuries, if any, testified about by the witnesses in this case, his suffering in body and mind, if any, resulting from such injuries, and also such prospective suffering and loss of health, if any, as the jury may believe, from all the facts before them in this case, he has sustained or will sustain by reason of such injury, his loss of time and services, and inability to work and earn a living for himself, resulting from such injuries, and may find for him such sum as, in the judgment of the jury, under the evidence, will be compensation for the injuries.[15]

§ 925. To Take into Consideration All the Facts and Circumstances as Detailed in Evidence—Permanency of Bodily Injuries. If the jury find for the plaintiff, they may, in estimating her damages, take into consideration all the facts and circumstances as detailed in evidence—her bodily injuries if any, and whether or not they are permanent in their nature—and allow her therefor such sum as they may believe, from the evidence, she has been damaged, not exceeding ten thousand dollars.[16]

14—L. S. & M. S. Ry. Co. v. Conway, 169 Ill. 505 (509), 48 N. E. 483.

"If the last paragraph of the above clause had been omitted, there might be ground for complaint. But the concluding direction is so clear and emphatic that the jury should not consider any element of damage unless such damage were established by the evidence, we do not think the jury have been misled."

15—Best Brewing Co. v. Dunlevy, 157 Ill. 141 (143), aff'g 57 Ill. App. 96, 41 N. E. 611.

This instruction approved in form, though held improper in this case as the declaration failed to make claim for permanent injury.

16—McNamara v. St. L. T. Co., 106 Mo. 349, 80 S. W. 303 (304).

"This instruction is characterized as deficient, in defining the elements which entered into recovery, and permitting the jury to award such damages as it might see fit. The phraseology here is rather general, and is silent as to features of pain and suffering usually comprehended in instructing the jury in such cases upon the legal measure of the plaintiff's award; but the jury is not left to grope in the dark, nor is the jury left to mere speculation and conjecture to the fatal degree condemned in the cases to which reference is made—notably Camp v. Wabash Railway, 94 Mo. App. 272, 68 S. W. 96, and like authorities. Where the injuries are of such nature that they are necessarily attended by physical pain and suffering the assumption of their presence is not in all instances prejudicial error; and if defendant desired the jury more specifically confined to consideration of all the proper elements of damages in such an action, an instruction properly framed of the character desired should have been presented. Wheeler v. Bowles, 163 Mo. 398, 63 S. W. 675; Dunn v. Railway, 81 Mo. App. 42; State ex rel. Kennen v. Fidelity & Deposit Co., 94 Mo. App. 184, 67 S. W. 958; O'Neill v. Blase, 94 Mo. App. 669, 68 S. W. 764."

§ 926. Future Mental and Bodily Suffering Allowable—Rule When Injury Is Permanent. (a) The court instructs the jury that, if the defendant is liable, the plaintiff is entitled to recover for bodily and mental suffering, if any, which she has heretofore undergone, or may reasonably be expected to undergo in the future.[17]

(b) If the jury find for the plaintiff, they might take into consideration, in estimating his damages, the probable effect and duration of the injury, if any, to his mind in the future.[18]

§ 927. Whether Certain Ailments Resulted from Injuries. (a) If you find for the plaintiff, you should allow him such damages as are shown to have been the result of the injury which he received at the time of the accident, not exceeding in any respect the amount claimed in the petition. In respect to plaintiff's pulmonary or other ailments, which manifested themselves subsequent to the accident, you will determine from the evidence whether they did or did not result from the injuries sustained at that time. If they did, and this was the sole cause of them, or if it developed them without fault or negligence of the plaintiff, you should allow proper damages therefor. If, however, they were the result, either wholly or in part, of negligence, or careless exposure, or improper indulgence in stimulants on the part of the plaintiff, damages should not be allowed on account thereof. Medical treatment and expenses therefor, and physical pain or mental suffering, is a proper element of damage to be considered.[19]

(b) There is no great physical injury proved here to this man at all. There is no evidence produced here before you as to any serious results that are apparent to your observation or to the observation of the physicians who have testified. It is claimed that his skull may or may not have been fractured; but there is no claim that there is any evidence now to determine that the skull was fractured, but that there were such results apparent from the conduct and behavior of the man that it might have been done, and that if it was done certain results would have followed. It is claimed by the

17—Miller v. Boone County, 95 Iowa 5, 63 N. W. 352 (354).

"It is urged that this instruction is error in so far as it authorizes damages for future pain and suffering, because it is not qualified by the thought that damages for future suffering should be based upon the evidence. Such a qualification is necessary where there is a contention as to the permanency of the injury. But in this case, the injury is shown beyond question to be permanent, and the direction to award such damages as may reasonably be expected to arise in the future refers to the condition of the plaintiff as shown by the evidence. The instruction is not vulnerable to the objection made to a somewhat similar one in Fry v. Railroad Co., 45 Iowa 416, where the jury were directed that damages might be assessed for all past, present or future physical suffering or anguish which is, has been or may be caused by said injury. That was held to be too broad, because it authorized the jury to enter the domain of conjecture. In the case at bar, the injuries were permanent, and with that fact established, there was no occasion to make the instruction any more specific than it was."

18—El Paso E. Ry. Co. v. Kendall, — Tex. Civ. App. —, 85 S. W. 61.

19—Hotel Ass'n v. Walters, 23 Neb. 380, 36 N. W. 561 (564).

defendant that this man was peculiar before, that he was really not a man of what is called perfectly sound mind before the accident, and I suppose the inference is claimed from that that this degeneracy that exists now naturally followed, and was not caused by the injury. You have this case to determine. Here is a man that was strong upon that day. There is at present no physical evidence that he ever suffered a severe injury You are at liberty to give this plaintiff damages for what you shall find to be the result and consequences of this injury. But you are not at liberty to give damages for anything that you are not satisfied has been proved by a preponderance of evidence to be the result of this injury. So to you is confided the important and delicate duty of determining just exactly what was the result of this injury, and how much of this man's condition as it appears to be now was produced by this injury. I say this is an important and responsible duty for you. It is not confided to the court. I have no opinion about it, and have no right to have any opinion about it; but it is my duty so to present this matter to you that when you get into the jury room you will clearly know and understand your duty in this regard.[20]

(c) The jury is instructed that even if you should believe, from the evidence, that the walk was in a defective condition, and that Mrs. J— did fall on the same in consequence of such defective condition, yet if you further believe, from the evidence, that she was injured thereby and that her subsequent and present condition is in fact the result of some other disorder, and that she is erroneously claiming that her present condition is the result of such fall, then you should not allow her anything for such condition.[21]

§928. **Care to Be Taken by Injured Person After Injury.** (a) It was the duty of plaintiff to use ordinary care, judgment and diligence in securing medical and surgical aid after she received the injuries complained of; if any she received; and if you find from the evidence that after she received such injuries, if any she did receive, she failed to use such ordinary care, judgment and diligence in procuring timely medical and surgical aid; and if you further find from the evidence that by reason of such failure her condition is now different and worse than it would have been if she had used such ordinary care, judgment and diligence in the premises then, if you find for the plaintiff, you should take this into account in making up your verdict, and should not allow her any damages for ailments and diseases, if any, that may have resulted from such failure.[22]

(b) If you find for plaintiff, and if you further find and believe that after the cinder got in plaintiff's eye he failed to use such care and means to avert or lessen his injuries as an ordinarily prudent

20—Sterling v. Detroit, 134 Mich. 22, 95 N. W. 986.

21—Village of Cullom v. Justice, 161 Ill. 372 (376), aff'g 59 Ill. App. 304, 43 N. E. 1098.

22—L. & N. R. Ry. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389; Citizens' St. Ry. Co. v. Hobbs, 15 Ind. App. 610, 43 N. E. 479 (481).

person, situated as plaintiff was, would have used under similar circumstances, and that by such failure, if any, his injuries were aggravated or increased, then, if you so find, you will not allow plaintiff anything on account of such aggravated or increased injuries.

(c) If you find from the evidence that after being so injured, if he was, the plaintiff exercised such care in attending to his wounds and in trying to care for same as an ordinarily prudent person would have done under the same or similar circumstances, then you are instructed that the defendant company would be responsible for such injuries so sustained by the plaintiff, even though you may believe that if the plaintiff had pursued some other course, or taken some other measure, in and about his injuries, they would not have resulted as seriously as the proof may show in this case they did result.[23]

(d) The court instructs you that for all the suffering, if any, either mentally or physically, which plaintiff could have prevented by the exercise of prudence and reasonable care, treatment and attention to his fingers that were hurt, if any, by the negligence of defendant's servants, he cannot recover anything; and if you believe from the evidence that plaintiff's bone felon was not bruised and injured at the time of the accident, then you will not consider the bone felon, or the condition of the hand on which the bone felon was, either then, thereafter, or now, or the suffering he may have endured therefrom, in arriving at your verdict, whatever may be your findings as to the accident on the other hand of plaintiff.[24]

(e) You are instructed that plaintiff would not be required to have an operation performed that a person in the exercise of ordinary care would not have performed. So, if you believe from the evidence that a person of ordinary care, for his own physical welfare, in the condition in which you find and believe from the evidence plaintiff was and is, would not have an operation performed, and if you find for the plaintiff, then you will consider plaintiff's injuries in the condition that they were and are without such operation.

(f) If you find in favor of plaintiff, then, in arriving at the amount of the verdict, you are instructed that if you believe from the evidence a surgical operation would benefit plaintiff's leg, and that the exercise of ordinary care on plaintiff's part would require him to have such operation performed, then it would be plaintiff's duty to have this done, and you will only consider plaintiff's injuries as they would be had this been done at such a time as a person of ordinary prudence would have had it performed.[25]

§ 929. **Failure to Use Due Care in Treating Injury.** You are instructed that in no event can the plaintiff recover for injuries he

23—Mo. K. & T. Ry. Co. of Texas v. Flood, 35 Tex. Civ. App. 197, 79 S. W. 1106 (1108).

24—St. L. S. W. Ry. Co. of Texas v. Ball, 28 Tex. Civ. App. 287, 66 S. W. 879 (882).

25—Mo. K. & T. Ry. Co. v. Schilling, 32 Tex. Civ. App. 417, 75 S. W. 64 (66)

may have sustained by any failure on his part to use due care in the matter of treating, or having treated, the original injury sustained by him.[26]

§ 930. **Defendant Not Liable For Aggravated Injuries Occasioned By Carelessness of Injured After Accident—Should Seek Proper Medical Attention.** (a) The jury is instructed that the plaintiff is not entitled to recover any damages for any disability, suffering or expense that resulted from her own failure to exercise proper and reasonable care after she received the injury of which she complains, which aggravated her condition, by failure to observe the instructions of her physician; and the city is not to be held responsible for any damages resulting from such neglect on her part.[27]

(b) The court instructs you that a person suffering injuries by the fault of another has no right to aggravate the same by carelessness or inattention to such injury, but if he does so, he has no right to recover from the party causing the original injury, damages resulting from such aggravation, and which resulted from his own carelessness.

(c) If, therefore, you should find from the evidence that the plaintiff received some injuries about the head and ear such as required medical treatment, then it was his duty to use reasonable diligence to procure proper and reasonable competent medical attention, and to continue to obtain for himself such treatment so long as his injuries appeared reasonably to require it. And if the evidence shows any failure on the part of the plaintiff to discharge the duty of obtaining reasonably proper medical attention, then he cannot recover damages for any aggravation of his injury or result therefrom occasioned by such failure.[28]

26—Texas P. C. Co. v. Poe, 32 Tex. Civ. App. 469, 74 S. W. 563.

"If plaintiff failed to use ordinary care to treat or have treated his injuries, and by reason of such failure the same were aggravated or increased, he could not recover from defendant damages for the increased injury resulting from his failure to use ordinary care, under all the circumstances, to have the same treated."

27—Zibbell v. Grand Rapids, 129 Mich. 659, 89 N. W. 563 (564).

"This instruction correctly embodied the law. Moore v. Kalamazoo, 109 Mich. 179, 66 N. W. 1089; Reed v. Detroit, 108 Mich. 224, 65 N. W. 967."

28—Citizens' St. R. Co. v. Hobbs, 15 Ind. App. 610, 43 N. E. Rep. 479 (481).

"That it is the duty of a party thus injured to use ordinary care and diligence in securing medical or surgical aid after receiving such an injury, and that he cannot recover for any suffering or ailment brought about by his failure to use such care and diligence can not be denied. That the injury was aggravated by such failure, is, of course, matter of defense; and after an injury by the defendant's negligence has been established the burden is on the defendant to show the plaintiff's failure to use ordinary care, judgment and diligence in having the injury properly treated. It is, of course, for the jury to determine whether anything should be deducted from the damages by reason of such negligent aggravation. These propositions are well supported by the authorities. City of Goshen v. England, 119 Ind. 369, 21 N. E. 977, 5 L. R. A. 253; L. N. A. & C. Railway Co. v. Falvey, 104 Ind. 409, 3 N. E. 389 and 4 N. E. 908; City of Bradford v. Downs, 126 Pa. St. 622, 17 Atl. 884; Gould v. Mc-

§ 931. **Injured Must Use Care in Selecting Doctor, but Not Insurer of Doctor's Skill.** You are instructed that it was the duty of the plaintiff to employ such doctor or doctors for the treatment of his injuries as ordinary prudence in his situation at the time of the injury, and thereafter required; and to use ordinary judgment and care in doing so, and to select only such doctor as was of at least ordinary care and skill in his profession; but the law does not make him an insurer in such cases that the doctor will be guilty of no negligence, error in judgment or want of care, and where such errors or mistakes occur in the treatment (the injured party using ordinary care) the injury resulting from such mistakes is properly regarded as part of the immediate and direct damages resulting from the original injury.[29]

§ 932. **Physicians' Services and Medicines—Negligence in Treatment of Wound.** (a) If the jury find for the plaintiff, they will assess her damages at such sum as you may believe will compensate her for her injuries, if any, she may have sustained by reason of the negligence of the defendant, together with such sum, if any, as you believe will compensate her for her suffering, including moneys paid, or which she has obligated herself to pay, for physicians' services and medicines by reason of said injuries and directly resulting therefrom.[30]

(b) While it was the duty of plaintiff to employ such medical attention as ordinary prudence in his situation required, and to use ordinary judgment and care in doing so, and to select only such as were of at least ordinary skill and care in their profession, yet if he exercised such judgment and care, then, in case you find him entitled to recover, under the evidence and the instructions of the court, you may take into consideration all injuries and impairments, if any, which directly resulted from the occurrence in question, even though they resulted, in part, through mistakes of some one or of any of his medical attendants. This liability, that a medical attendant (provided ordinary care was used in his selection) may make mistakes or errors, is by you (but as limited by above provisions) to be con-

Kenna, 86 Pa. St. 297, 27 Am. Rep. 705; Ludlow v. Yonkers, 43 Barb. 493; Beach, Contrib. Neg. §§ 69, 70."

29—C. & E. I. R. R. Co. v. Burridge, 107 Ill. App. 23 (30). See C. E. R. R. Co. v. Meach 163 Ill. 305, aff'g 59 Ill. App. 65, 45 N. E. 390.

30—New v. St. L. & S. Ry. Co., 114 Mo. App. 379, 89 S. W. 1043.

"The giving of the above instruction on the measure of damages is assigned as error, on the ground that contributory negligence, generally, is pleaded in the answer, and that this plea would include negligence in the treatment of the injury whereby it was aggravated. The plea of contributory negligence may be broad enough to include negligence in the treatment of the wound, causing aggravation and increase of the injury, but to warrant an instruction on any issue in a case there must be some evidence tending to prove that issue. There is not a ray of evidence proving, or tending to prove, that plaintiff was negligent in the treatment of her wound. In her excitement plaintiff did not realize the extent of the injury until hours after it had been inflicted, in fact, not until the following morning when she called a physician, and there is no evidence that the home

sidered as part of the immediate and direct damages resulting from the occurrence in question.[31]

§ 933. Violated Instructions of Physician, Thereby Preventing Recovery. If you believe from the evidence that after the defendant received his injury (if you believe he received any), he did not properly care for the same, but negligently violated the instructions of his physician, and negligently used and walked upon his injured leg, and thereby prevented and delayed the recovery of said injury or wound, you cannot find for any additional damages caused by such neglect.[32]

§ 934. Frightening Person Near Track, Producing Miscarriage—Contributory Negligence. (a) Although you should find that the agents of defendant in charge of its train failed to blow the whistle or ring the bell, but you further believe that the plaintiff, by the use of ordinary care, could have prevented a miscarriage of his wife, and that he failed to exercise such care to prevent or lessen the injury, and such failure contributed to the miscarriage, then for such injury plaintiff cannot recover.

(b) In this connection you are instructed that if plaintiff's wife was frightened in the manner alleged, and thereafter threatened with miscarriage, and during that time was conveyed to her home in a wagon, and the same produced or contributed to produce a miscarriage, then for the physical and mental pain suffered by reason thereof plaintiff cannot recover.[33]

§ 935. What the Jury May Think Right and Proper in View of All the Facts and Circumstances Proved (a) The jury are instructed

treatment she applied to the wound on the day of her injury was not remedial and proper. We think, under the evidence, the defendant has no just ground to complain of the instruction." On this subject see Elliott v. Kansas City, 174 Mo. 554, 74 S. W. 617.

31—Chi. C. Ry. Co. v. Nelson, 116 Ill. App. 609, aff'd 215 Ill. 436, 74 N. E. 458.

"The instruction is said to be erroneous because, by its last sentence, the liability that a medical attendant may make mistakes is made an element of damages, and that there is no evidence on which to base the instruction. A sufficient answer to the first claim is that there is no contention that the damages awarded appellee are excessive. The other claim is not, in our opinion, tenable, because one of the physicians who attended appellee failed to discover that there was a fracture of his shoulder, which the evidence shows was the principal injury from which he suffered."

32—Gulf, C. & S. F. Ry. Co. v. Denson, — Tex. Civ. App. —, 72 S. W. 70.

"This special charge should have been given. Appellant was entitled to have the court explain to the jury the principles of law applicable to the very facts constituting his defense."

33—St. L. W. Ry. Co. v. Mitchell, 25 Tex. Civ. App. 197, 60 S. W. 891 (893).

"It is said that this charge was erroneous in that it excluded from consideration every act of negligence on the part of plaintiff happening after the alleged fright, except that referred to in the charge. The charge as given renders this criticism baseless because in the same paragraph, and following the above, the court added: 'Or if plaintiff's wife miscarried, and the same was caused or produced from any cause other than the fright, if any, occasioned by reason of the matters and things alleged in plaintiff's petition, then plaintiff cannot recover any sum for the physical or mental pain suffered

that if they, under the instructions of the court, from the evidence believe that the plaintiff is entitled to recover in this action, then, in assessing her damages the jury are at liberty to take into account the character and extent of the plaintiff's injuries, so far as they have been proved by the evidence, the pain and suffering endured by her if any, in consequence of such injury, her costs of medical attendance, if such a loss of time and costs have been proved, and where such damages as the jury may, from the evidence, think proper and right in view of all the facts and circumstances proved on the trial. The jury can only allow actual damages by way of compensation. In this case damages by way of punishment are not allowed.[34]

(b) You are at liberty to take into consideration the injuries, so far as they have been shown by the evidence; the pain and suffering endured by the injured party; his loss of time, if loss of time has been proven,—and award such damages as you may think proper and right in view of all the circumstances proven on the trial of this case. If you find that the injuries were inflicted willfully and maliciously, then you are not limited to mere compensation for the actual damages sustained, but may give such further sum by way of exemplary damages as an example to others to deter them from offending in a like manner.[35]

§ 936. Damages for Personal Injury in Sound Discretion of Jury, From All the Facts in the Case, etc. If you find under the instructions already given, gentlemen of the jury, that the plaintiff is entitled to recover in this action, the amount of the recovery is for you to determine from all the facts in the case. Of course you cannot measure in dollars and cents the exact amount which she is entitled to recover, but it is for you to say in the exercise of a sound discretion, from all the facts in the case, after considering and weighing all the facts in the case, without fear and without favor, without passion and without prejudice, what amount of money will reasonably compensate her for the damages and injury which she has suffered.[36]

§ 937. Jury May Estimate Damages from Facts and Circumstances in Proof, in Connection with Their Knowledge, Observation and Experience in Business Affairs of Life—Limitation of the Rule. (a) If from the evidence and under the instructions of the court, the jury shall find the issue for the plaintiff, and that the plaintiff has sustained damages as charged in the declaration, then to enable the jury to estimate the amount of such damages, it is not necessary that any witness should have expressed an opinion as to the amount of such damage, but the jury may themselves make such estimate from the facts and circumstances in proof, and by considering them in con-

by her by reason of such miscarriage.'"

34—Rees v. Rasmussen, 5 Neb. (unof.) 367, 98 N. W. 830.

35—Gorstz v. Pinske, 82 Minn. 456, 85 N. W. 215 (216).

36—Bell v. Spokane, 30 Wash. 508, 71 Pac. 31 (33).

nection with their knowledge, observation and experience in the business affairs of life.[37]

(b) The court instructs the jury that if, under the evidence and instructions of the court, you find the defendant guilty, then in assessing the plaintiff's damages, if any such damages as are alleged in her declaration are proved, you have a right to take into consideration the nature, extent and character of the injury sustained by her, so far as the same is shown by the evidence, if any such are so shown, the pain and suffering undergone by her in consequence of such injury, if any such is shown by the evidence, and assess damages in such sum as in your judgment will compensate the plaintiff for such injury and pain and suffering.[38]

(c) If from the evidence in the case and under the instructions of the court the jury shall find the issue for the plaintiff, and that the plaintiff has sustained damages as charged in the declaration, then to enable the jury to estimate the amount of such damages it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jury may themselves make such estimate from the facts and circumstances in proof.[39]

37—Ottawa Gas L. Co. v. Graham, 28 Ill. 73, 81 Am. Dec. 263; Norton v. Volzke, 158 Ill. 402, 41 N. E. 1085, 49 Am. St. Rep. 167, aff'g 54 Ill. App. 545; N. C. St. R. R. Co. v. Fitzgibbons, 180 Ill. 466 (469), aff'g 79 Ill. App. 632, 54 N. E. 483; Richardson v. Nelson, 221 Ill. 254 (258, 259), 77 N. E. 583.

In the Fitzgibbons case, the court said: "Where there are elements of damage such as expenditure, capable of pecuniary measurement, the law requires that the amount shall be proved. But there are other elements in this case which are not capable of exact measurement. The amount of compensation for pain and suffering, and the future consequences reasonably certain to result, are not capable of exact proof by any pecuniary standard. Such damages are alleged in the declaration, and the evidence tends to prove them * * * but the question of their amount must be left from necessity to the deliberative judgment of the jury the trial court and the Appellate Court. The jury from the nature of the case must estimate such damages by considering the facts and circumstances in connection with their knowledge, observation and experience in the affairs of life."

38—Springfield Ry. Co. v. Hoeffner, 175 Ill. 634 (641), aff'g 71 Ill. App. 162, 51 N. E. 884.

"An instruction is not wrong which tells the jury that, in making an estimate of damages, they shall exercise their judgment upon the facts in proof by connecting them with their own knowledge and experience; where the reference is to the usual general knowledge 'which they are supposed to possess in common with the generality of mankind.' They are authorized to test the truth and weight of the evidence by their own knowledge and judgment derived from experience, observation and reflection. Chicago v. Major, 18 Ill. 349, 68 Am. Dec. 553; Ottawa G. L. & C. Co. v. Graham, 28 Ill. 73, 81 Am. Dec. 263. Where an instruction, in an action for damages for a personal injury authorized the jury to award such reasonable sum as would compensate the plaintiff for the impairment of his power to earn money in the future, and such reasonable sum as would compensate him for the pain and anguish suffered by reason of his injury, it was held that these elements were from necessity left to the sound discretion of the jury. Baltimore & Ohio S. W. Ry. Co. v. Then, 159 Ill. 535, 42 N. E. 971; I. C. R. R. Co. v. Cole, 165 Ill. 334, 46 N. E. 275; W. C. St. R. R. Co. v. Carr, 170 Ill. 478, 48 N. E. 992."

39—C. P. & St. L. Ry. Co. v. Lewis, 48 Ill. App. 274 (280, 281), aff'd 145 Ill. 67, 33 N. E. 960.

"We regard it as a fair and

§ 938. **Injury to Postal Clerk—Compensation from Other Sources Will Not Release or Diminish Amount Defendant is Liable for.** It is immaterial whether the government paid the plaintiff anything or not. That would not affect the rights of the plaintiff in this case to recover against the railroad company.[40]

§ 939. **Measure of Damages Limited to What Is Alleged and Proved, and What Results from Accident.** (a) You are further instructed that, if you find for plaintiff, you cannot find any damages for him not alleged and proved. There cannot, in any event, be any recovery for loss of time or sickness not both alleged and proved by a preponderance of the evidence.[41]

(b) The court instructs the jury that, in assessing the damages for the plaintiff, you have no right to assess the damages at any larger sum than the plaintiff has actually sustained; and in assessing such damages, you will be limited to the injuries, if any, resulting from the accident.[42]

§ 940. **Omitting Element of Damages in An Instruction Not Error, if Instruction Otherwise Correct—Omission Should Be Corrected by Special Charge.** Should you find for plaintiff under the instructions

proper statement of the rule of law applicable to the subject under consideration. Necessarily the estimate of damages for personal injury and physical suffering must depend upon the judgment of the jury. There can be no direct proof in regard to it, and no witness can be allowed to express his opinion upon the point."

40—N., C. & St. L. Ry. v. Miller, 120 Ga. 453, 47 S. E. 959 (960).

"When one engaged in any calling or avocation from which he derives a pecuniary benefit is compelled to give up for a time the performance of his duties, as the result of an injury inflicted upon him by a wrongdoer, he is entitled, a general rule, to demand compensation for the time thus lost at the hands of the wrongdoer who inflicted the injury. The general rule is that, where a wrongdoer causes time to be lost, he will not be heard to say that the person injured has suffered no pecuniary loss, because he has received, as a direct result of being injured, contributions which in amount aggregate more than what would have been earned during the time; nor will his liability be diminished to the extent of contributions which were less than what would have been earned. If, from motives of affection, philanthropy, or as the result of a contract, the plaintiff has received from one other than his employer any sums, the reception of which are directly attributable to the fact that he has been injured, the person causing the injury will not be allowed to urge the payment of such sums in mitigation of the damages claimed against him. Thus it has been held that the damages will not be reduced by any amount of insurance received in consequence of the wrongdoer's act. See Western & A. R. R. v. Meigs, 74 Ga. 857 (5); Cunningham v. R. Co., 102 Ind. 478, 1 N. E. 800, 52 Am. Rep. 683. Nor will the fact that medical attention and nursing have been rendered gratuitously preclude the injured party from recovering the value of such services."

41—Sonka v. Sonka, — Tex. Civ. App. —, 75 S. W. 325.

"It merely informed the jury that damages must be predicated on allegation and proof, and that in no event could damages arising from loss of time or sickness be recovered, unless supported by allegation and proof. If the latter part of the charge could have improperly influenced the jury, it might have been that it would cause them to believe that while it was important that damages for loss of time and sickness should be alleged and proved, in order to justify a recovery, it was not so essential as to other damages. We do not think there is any cause for complaint as to the charge."

42—L. E. & W. R. R. Co. v. Delong, 109 Ill. App. 241 (245).

herein given you, then in estimating the damages, if any, you award the plaintiff, you may take into consideration the mental and physical pain and suffering, if any, endured by plaintiff's wife by reason of her injury, if any, and allow plaintiff such a sum of money as you may believe from the evidence will be a fair and reasonable compensation for such mental and physical pain and suffering, if any, by reason of such injury, if any.[43]

§ 941. **Compensatory Damages Only.** (a) I charge you that in cases of this kind the plaintiff can recover only the actual damages suffered by him, unless the master authorized the commission of the acts complained of or participated therein, or ratified it after its commission.[44]

(b) If you find that the plaintiff is entitled to recover damages from the defendants, or either of them, you should only award the plaintiff such damages as will, in your judgment, after a fair and conscientious consideration of the evidence in the case, justly compensate him for the injuries he has suffered, if any, and will suffer, if any, as the result of the collision between the ———— and the ————. And the burden is upon the plaintiff to prove each element of damage claimed by him by the greater weight of the evidence, and such element or elements of damage, if any, as are not proven by the greater weight of the evidence, are not to be allowed by you.[45]

§ 942. **Exemplary Damages—In Tort Generally.** The jury are instructed, that in actions of this kind, if the jury find the defendant guilty, under the evidence and instructions of the court, and if they further find, from the evidence, that the injury complained of was inflicted willfully or maliciously, and that the plaintiff has sustained any actual damage thereby, then the jury, in assessing damages, are not limited to mere compensation for the actual damage sustained,

43—Knauff v. San Ant. Trac. Co., — Tex. —, 70 S. W. 1011.

"Undoubtedly, the charge, so far as it goes, is correct, and the attack upon it must be on the ground of an error of omission. No special charge was requested that would supply the omission, and through an unbroken line of decisions from Dallam's Reports to the present it has been uniformly held that advantage cannot be taken on appeal of an error of omission in the charge of the trial court, unless a special charge, intended to supply the omission, has been requested and refused. Harlan v. Baker, Dallam. Dig. 578; Beazley v. Denson, 40 Tex. 416; T. & P. R. R. Co. v. Eberheart, 91 Tex. 321, 43 S. W. 510. In the case of Terry v. G. C. & S. F. R. R. Co., 14 Tex. Civ. App. 451, 37 S. W. 234, the court omitted an element of damages pleaded, and the court held: 'If the court had given an incorrect charge on the measure of damages as to the items submitted, this would have been error, and a special charge seeking to correct it would not have been essential in order to raise the objection to the charge. But when the main charge fails to include all the items of damages claimed, this is an omission which should be corrected by a special charge seeking that end.'"

44—Trabing v. Cal. Nav. & Imp. Co., 121 Cal. 137, 53 Pac. 644 (646).

45—C. & E. R. R. Co. v. Clemminger, 178 Ill. 536 (538), aff'g 77 Ill. App. 186, 53 N. E. 320.

but they may give him such further sum, by way of exemplary or vindictive damages, as a protection to the plaintiff, and as a salutary example to others, to deter them from offending in like manner.[46]

§ 943. **Punitive Damages—Actual Damages Very Small.** If you come to the question of punitive damages, the purpose of the law, if the plaintiff makes out her case, is to punish the other party, and the amount of actual damages, cuts, so to speak, or might cut, a very little figure in the case. If they are entitled to punitive damages, then you will assess such an amount as will punish them for their wanton and malicious conduct.[47]

§ 944. **Negligence May Be So Gross and Reckless as to Imply Intent, for Purpose of Allowing Punitive Damages.** The court instructs the jury that under this complaint, if you find the negligence was so gross, or that from a reckless disregard of the safety of the passengers, the injury resulted, you are allowed to give exemplary damages in the way of punishment. Negligence may be so gross and so reckless as to imply the act was done willfully or with premeditation.[48]

§ 945. **Punitive Damages—Smart Money.** (a) If you find that the conduct of the defendant was wanton and malicious, without any

46—Pike v. Dilling, 48 Me. 539; McWilliams v. Bragg, 3 Wis. 424; Dibble v. Morris, 26 Conn. 416; Ousley v. Hardin, 23 Ill. 403.

47—Beaudrot v. So. R. Co., 69 S. C. 160, 48 S. E. 106.

"This was correct as a general statement of the law, and we do not think can be fairly construed to mean, as defendant contends, that the jury should not take into consideration the insignificance of the actual damages in fixing the amount of punitive damages."

48—Boyd v. Blue R. Ry. Co., 65 S. C. 326, 43 S. E. 817 (818).

"This qualified what has been said before, and, taken in connection with the illustration immediately following—of a street car driven with extra speed through a crowded street—made it clear that it was not simply gross negligence, but negligence gross and reckless of consequences to others to such degree as to assume the nature of willfulness, which the jury must have understood to be necessary to warrant a verdict for exemplary damages. If it is fair to conclude the jury received this impression, the charge in this regard is fully sustained by the view of this court as expressed by Chief Justice McIver in Proctor v. Railway Co., 61 S. C. 189, 39 S. E. 358. To illustrate by stating a hypothetical case as was done here, sometimes gives the jury a clearer apprehension of the legal terms the trial judge is obliged to use in his charge. While such illustrations should no doubt, be used with great caution, they are admissible when they contain no statement of the facts of the case under consideration, and no intimation of the opinion of the judge on the facts. Mew v. Ry. Co., 55 S. C. 100, 32 S. E. 328; Welch v. Mfg. Co., 55 S. C. 583, 33 S. E. 739; Mason v. Ry. Co., 58 S. C. 78, 36 S. E. 440, 53 L. R. A. 913, 79 Am. St. Rep. 826; Sims v. Ry. Co., 59 S. C. 256, 37 S., E. 836. In this case the illustration was hypothetical and contained no reference to the evidence offered, and no intimation as to the merits of the case before the court. Even if the illustration could be regarded as furnishing to the jury a standard of gross and reckless negligence amounting to willfulness, it was not unfavorable to the defendant that the jury should be led to think the plaintiff must make out a case as strong as the example given by the court before he could recover exemplary damages."

color of justification or excuse, the law is so that, where an act is done wantonly or maliciously, and without any color of justification or excuse, then in such case what is called punitive or vindictive damages may be given in addition to the actual damages which the party suffered by reason of the injury, as a sort of smart money, to teach the defendant and others in like cases better than to do such a thing. And, if you find this to be a case warranting such damages, you may, in addition to the rule which I have laid down to you with reference to what the law calls damages for the mental and physical suffering which the plaintiff has endured, take into consideration the expense he has been put to in excess of the taxable costs in procuring this action.[49]

(b) The plaintiff is not entitled to punitive damages unless the defendant's conduct was willful, malicious, wanton, or so reckless as to evince an utter disregard of the plaintiff's rights.

(c) The plaintiff is not entitled to actual damages unless the defendant's conduct was willful or negligent.

(d) The plaintiff is not entitled to actual damages unless he has established some pecuniary damages or some personal injury resulting in loss.

(e) The plaintiff in this case has adduced no testimony tending to show that he has sustained any pecuniary damage or personal injury resulting in loss.

(f) In the absence of direct proof of substantial damages as the result of breach of contract or tort, the damages implied by law can be only nominal.

(g) Plaintiff is not entitled to damages for inconvenience, loss of time, and fatigue, unless it has produced some pecuniary damage or personal injury resulting in some actual loss.[50]

49—Hull v. Douglass, — Conn. —, 64 Atl. 351.

"While the damages which the jury may, in actions of tort like the one before us, award, damages not exceeding the plaintiff's expenses in the litigation of the suit, are in fact and effect compensatory, and not punitive, yet they are in practice variously termed 'exemplary,' 'punitive,' 'vindictive,' or 'smart money,' and the charge of the court is not erroneous merely because in correctly telling the jury when they may take into consideration such expenses, it speaks of the damages as commonly called by one or the other of these terms. Hanna v. Sweeny, 78 Conn. 492, 62 Atl. 785; Church v. Beach, 26 Conn. 182, 4 Am. Rep. 55; Burr v. Plymouth, 48 Conn. 460; Maisenbacker v. Society Concordia, 71 Conn. 369, 42 Atl. 67, 71 Am. St. Rep. 213. The charge in this case did not, as it properly should, in express terms instruct the jury that the damages they might award under the name of 'exemplary damages' must be limited in amount by the amount of plaintiff's expenses, less the taxable costs in the suit. We think, however, in view of all the circumstances appearing in the record, it did, in effect, so advise the jury, and there is nothing in the charge to support a different implication, and therefore the exception taken to the charge in Hanna v. Sweeney, supra, does not apply to the charge in this case."

50—The six short instructions above were given for the defendant in the case of Miller v. So. Ry. Co., 69 S. C. 116, 48 S. E. 99 (102).

§ 946. **Illness Caused by Poisonous Gases from Excavations—Damages.** If you believe from the evidence that the said ———— Company, in constructing its line of railroad through the city of J———, caused to be dug up, excavated and removed from the said lots mentioned in plaintiff's petition the earth as therein alleged, thereby causing water to accumulate and stand in said excavation, which became stagnant, producing poisonous, noxious, malarial gases, and decaying substances, resulting in sickness to plaintiff's wife, which sickness compelled plaintiff to employ a physician, and expend money for medicines and doctors' bills, in the treatment of his said wife for such sickness, then you will find for the plaintiff such sum so necessarily expended by him for said doctors' bills and medicines, if any, and such other sum as will actually compensate for the mental and physical pain, if any, suffered by reason of such sickness, if any.[51]

§ 947. **Plea of Compromise and Settlement.** As to the plea of compromise and settlement of plaintiff's cause of action and claim for damages in this action, I instruct you that the burden is upon the defendant to prove said plea by settlement and payment by a preponderance of the evidence. To sustain said plea of settlement and payment it must clearly appear that a definite and distinct proposition was made upon the part of the company defendant, which proposition in its terms was accepted by the plaintiff in settlement and adjustment of his claim for damages.[52]

51—Adams v. Mo. K. & T. Ry. Co. of Tex., — Tex. Civ. App. —, 70 S. W. 1006 (1007).

52—Ind. St. Ry. Co. v. Haverstick, — Ind. —, 74 N. E. 35-36.

"Appellant insists that the instruction was prejudicial for two reasons: First, because the court said 'it must clearly appear.' This language placed on the appellant a heavier burden than the law imposes in proving its defense. Second, because the court said to the jury that there could be only a compromise by a proposition from the defendant and its acceptance by the plaintiff. Now we respectfully call attention to the fact that we alleged and proved that the proposition came from the plaintiff and was accepted by the defendant. In other words, the court virtually ruled out the whole question of settlement. The instruction should be read in connection with the one following. So much of that instruction as is pertinent is as follows: 'But if you find that plaintiff and defendant came to an arrangement as to his claim for damages; that plaintiff agreed to accept $200 in full settlement of his claim; that defendant accepted said offer, and offered and tendered plaintiff said sum in full payment of his claim for damages, and has brought said sum into court for the use and benefit of plaintiff—then I instruct you that plaintiff is not entitled to recover in this action as to damages.' The question of settlement between appellant and appellee is presented by the second paragraph of answer. The answer avers that appellant agreed to pay appellee $150 in full of all damages he susfained and that the latter submitted a counter proposition that, if the former would pay him $200, he would accept the same in full settlement. It is then alleged that appellant accepted appellee's proposition, offered to pay him $200, which he refused, and that thereupon it brought said sum into court for his use and benefit. So it appears from the answer that the initial step looking into a compromise was taken by appellant. The instruction is in substantial harmony with the answer, and

§ 948. **Action by Husband for Injuries to Wife—Pain and Suffering of Wife.** If you find for the plaintiff, you will allow him such sum as will, in cash, compensate him for the physical pain and mental anguish that his wife has suffered, if she has so suffered, and if you find that plaintiff has necessarily incurred or paid any expenses for medicines or medical attention on account of the sickness of his wife or child, or both, if they were sick, then you will allow plaintiff the reasonable value of the medicines or medical attention so necessarily incurred; and if you further believe that on account of the sickness of——, the plaintiff's wife had to nurse him, and that plaintiff has been deprived of the services of his wife, then you will allow him the reasonable value of the wife's said services, of which he has been necessarily deprived, if any.[53]

§ 949. **What May Be Taken into Consideration in Assessing Damages—Married Woman Can Recover for Medical Expenses.** (a) The court instructs the jury that, if you find the issues for the plaintiff, you will, in estimating her damages, take into consideration the character and extent of her injuries, the mental and physical pain and suffering endured by her in consequence of such injuries and their permanency, if by the evidence shown to be permanent, and

read in connection with the one following, was not misleading. As a question of law, it cannot matter from whom the proposition for settlement came. If one was made and accepted it constituted a contract, and, in the absence of fraud, was binding on both parties. Cartmel v. Newton, 79 Ind. 1; Fairbanks v. Meyers, 98 Ind. 92; Brown v. Russell, 105 Ind. 46, 4 N. E. 428. The question of settlement was an affirmative issue tendered by the second paragraph of answer, and the burden of proving it was, as the court told the jury upon appellant. The instruction was correct, unless the court was in error in saying to the jury that 'it must clearly appear' that a definite proposition was made and accepted. In this instruction the jury were told that 'the burden is upon the defendant to prove said plea of settlement and payment by a preponderance of the evidence.' In another instruction the court properly told the jury what was meant by the expression 'preponderance of the evidence.' So it was left to the jury to determine, from a preponderance of the evidence, whether or not appellant had established the defense set up in its second paragraph of answer. In the case of Hart v. Niagara Fire Ins. Co. — Wash. —, 38 Pac. 213, 27 L. R. A. 86, the trial court instructed the jury that before they could find the existence of a certain fact, they 'should be satisfied by a clear preponderance of the evidence.' In disposing of the instruction the court said: 'It seems to us that in connection with the instructions given above, the phrase "clear preponderance of the evidence" amounts to nothing more than a preponderance of the evidence or a distinct preponderance of evidence, which would, of course, be necessary to a verdict, as it must be a distinct preponderance before the preponderance can be ascertained. Construing the instructions altogether we think the jury was not misled by the instructions.' Construing the instruction, and that part of the one following above copied, and the instruction defining that expression 'preponderance of evidence,' together, we do not think that the jury were in any way misled as to their duty. Neither do we think that the instruction placed on the appellant a heavier burden than the law imposed in proving its defense. As applied to the evidence, the instructions upon the question of compromise and settlement fairly stated the law, and were not prejudicial to appellant."

53—St. L. S. W. Ry. Co. v. Duck, — Tex. Civ. App. —, 69 S. W. 1027.

any amounts shown by the evidence to have been expended by her or contracted by her for medical and surgical attention—this item not to exceed one hundred and twenty-five dollars—and you may find for her in such sums as, under the evidence, will be a reasonable compensation for the injuries shown by the evidence to have been sustained by her; in all, not to exceed the sum of five thousand dollars.[54]

(b) If you find for the plaintiff, you must state in your verdict the amount of damages to which she is entitled. This amount should be a full and just compensation for the injury she received, and no more. In estimating such compensation you may consider any bodily pain and suffering and illness that may have resulted from the injury, and the pain, anxiety and distress of mind, if any, she suffered by reason thereof, or by reason of any medical treatment that became necessary for her to undergo; the extent and character of the injury, and whether or not it is permanent; and also the amount, if any, which she has paid from her own separate means for medical treatment or services; but you should not allow her anything for the value of her time or services as a laborer or housekeeper, nor for the value or cost of her care or support during the time of her illness. These things her husband is bound to furnish, and for them he, if anyone, may recover. It is claimed by the defendant that the pain and suffering of the plaintiff has been increased, and the injury she received has been aggravated and made worse than it otherwise would have been, by her own negligence and carelessness of her limb since the injury; and, if the limb is permanently disabled, that is due alone to such negligence and careless conduct, and not to the original injury. If such facts are proved by a fair preponderance of the evidence, you should not allow the plaintiff any compensation for such increased pain, suffering or aggravation of the injury so caused by her own negligence or carelessness; but, if the plaintiff called

54—Ashby v. Elsberry & N. H. G. R. Co., 111 Mo. App. 79, 85 S. W. 959.

"In regard to the above instruction, it is insisted that it is too broad, and that plaintiff, being a married woman, is not entitled to recover for medical aid and attention. The latter objection is answered against defendant by the case of Hickey v. Welch, 91 Mo. App. 15, where it is said: 'It is also assigned for error that plaintiff was permitted to recover the cost of medical attendance at all, on the ground that her husband was liable for such necessary expense instead of her. That was once law in this state but since a married woman has been sui juris, is no longer. If she personally incurs such a debt or makes such an outlay, she may recover it. Rev. St. 1899, 4335; Hill v. Sedalia, 64 Mo. App. 494.' In respect to the other objection, to wit, that the right to recover is stated too broadly, it will be found that it is stated no broader than in a like instruction given in the case of Browning v. Railway, 124 Mo. 55, 27 S. W. 644, where at page 72, 124 Mo. and at page 648, 27 S. W. 644, in regard to which instruction the court said: The instruction is not erroneous in its general scope, and if, in the opinion of counsel for defendant, it was likely to be misunderstood by the jury, it was the duty of the counsel to ask the modifications and explanations, in an instruction embodying his views."

reputable and reasonably competent physicians to treat the injury, the amount of her compensation should not be reduced by reason of any wrong treatment the physicians may have given or administered; and, if she followed their directions in her conduct and use of her limb, she cannot be charged with negligence or carelessness, even if such conduct or use were not proper, and aggravated the injury.[55]

§ 950. **Right of Married Woman to Recover for Her Own Injuries—Damages, Compensatory and Punitive.** If the jury find for the plaintiff, the measure of her damages will be a fair equivalent in money, for the mental and physical pain and suffering that she has endured or may endure, if any, and a fair equivalent in money for the permanent impairment of her ability to earn wages and compensation by her own labor and service performed for others than her husband, and independently of her husband, and independently of her duties to her husband, and independently of the care of her children, if any, as the natural result of her injuries as in the testimony described; and if the jury find from the testimony that the injuries of plaintiff in the testimony described were caused by gross negligence of defendant's servants in charge and control of the car in the testimony described, then the jury may, in their discretion, governed by the testimony in the cause, give a further sum as punitive or exemplary damages, not exceeding in all twenty thousand dollars.[56]

§ 951. **Damages for Injury to Married Woman—What to Consider.** If from the evidence and the law given you in these instructions you find for the plaintiff, you may take into consideration the bodily pain and suffering caused by the injury, if any has been shown, and the pain and suffering which will result therefrom in the

55—City of Goshen v. England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253.

56—So. C. & C. St. Ry. Co. v. Bolt, 22 Ky. L. 906, 59 S. W. 26 (27).

"In our opinion, this instruction was not prejudicial to the appellant. It told the jury that she was entitled to recover for the mental and physical pain and suffering that she had endured, and that she might thereafter endure, and also a fair equivalent in money for the permanent impairment of her ability to earn wages by services performed for others than her husband, etc. Under the law of this state she was entitled to earn wages, and, if she was deprived of her ability to do so by the negligence of the appellant, she is entitled to recover a fair equivalent in money. The court was endeavoring to tell the jury that the mere fact that she might have performed household duties for her husband and children was not to be taken in account in determining what she could have probably earned. In other words, it was to take from the jury the idea that she was confined to household duties, and for which she might not receive any compensation in money. Our opinion is that, if a married woman is injured by the negligent act of another, she is entitled to maintain an action for damages, and the same criterion of recovery exists as to her as to a man or a single woman. She is entitled to her wages under the act of 1873. Besides, in this case, the husband joins the wife in the action and asks that the compensation be made to her for the injury which she received hence removes the question that is raised by counsel for the appellant, to-wit, that any wages she might earn would belong to her husband."

future, if you find from the evidence that such will probably be the result; also the probability of the injuries she has received being permanent, and the extent if any, to which the injury has incapacitated her for labor; also the reasonable expenses paid or incurred for services of a surgeon or physician, made necessary by such injuries—and assess her damages in such sum as you believe, from all the evidence, will compensate her for the injury so sustained. You should allow no speculative damages but such as are compensatory merely.[57]

§ 952. **Becoming Pregnant After Injury, Thereby Prolonging Recovery, Not Necessarily Negligence.** If the after-pregnancy of the plaintiff may have prolonged the injury or delayed her recovery, the damages which she is entitled to recover, are not to be reduced by you because of such pregnancy.

It was the duty of the plaintiff, after the accident, to take reasonable care of herself and to avoid, so far as was reasonably possible, doing anything which would tend to increase, prolong, or render permanent her injuries, sufferings or disability.[58]

57—L. W. Pomerene Co. v. White, 70 Neb. 171, 97 N. W. 232 (234).

"Damages recoverable in actions for personal injuries may be divided into two classes: Pecuniary damages, or those which can be accurately estimated, as loss of wages, cost of medical attendance, etc., and non pecuniary damages, the amount of which cannot be determined by any known rule, but depend upon the enlightened judgment of an impartial court or jury. In the latter class are included damages for pain, suffering, loss of reputation, impairment of faculties, etc. In Central City v. Engle, 65 Neb. 885, 91 N. W. 849, the pecuniary damage for loss of wages, and the non pecuniary damage for pain, suffering and permanent disability, were both submitted to the jury as the measure of plaintiff's recovery, and for this action of the trial court the cause was reversed. In the case at bar no pecuniary damages are asked because of the loss of the plaintiff's wages, nor was any testimony offered tending to show the money value of such services, and the portion of the instruction excepted to in the instant case appears to have been given only for consideration in determining the extent and nature of the injury. Considered from this view point, the instruction is not in conflict with the decision in the Engle case. In states in which married women are permitted to contract for themselves, and in which they are permitted to engage in business or employment in their own behalf, it has been frequently held that in an action for personal injuries it is proper to prove that a married woman is incapacitated from labor as the result of her injuries for the purpose of showing the nature and extent of her disability. This rule seems founded on sound reason, because it is apparent that the mere fact that a married woman is not engaged in a separate business at the time she is injured should not deprive her of the right to recover for a disability that would ever afterward bar her from engaging in an occupation in her own behalf. Stutz v. R. Co., 73 Wis. 147, 40 N. W. 653, 9 Am. St. Rep. 769; Powell v. R. Co., 77 Ga. 192, 3 S. E. 759; Jordan v. Middlesex, 138 Mass. 425; Harmon v. R. Co., 165 Mass. 100, 42 N. E. 505, 30 L. R. A. 658, 52 Am. St. Rep. 499; Met. St. R. Co. v. Johnson, 90 Ga. 500, 16 S. E. 49."

58—Salladay v. Town of Dodgeville, 85 Wis. 318, 55 N. W. 696 (698, 700), 20 L. R. A. 541.

"The instructions of the court in respect to the effect of the after-pregnancy of the plaintiff upon the question of damages, we think were correct. If the plaintiff had rendered the consequences of the wrongful act of the defendant more

§ 953. **Inability to Bear Children—Pain and Suffering—Permanency of Injury.** The court instructs the jury that if under the evidence they find the defendant guilty as in the amended declaration alleged, then, in estimating the damage of the plaintiffs, they have the right to take into consideration the personal injuries inflicted upon the plaintiff,——, in consequence of the defendant's wrongful acts, if any such injuries are proved, and the pain and suffering, both mental and physical, undergone by her in consequence of such injuries, if such pain and suffering have been proved; and if they further believe from the evidence that the said injuries are permanent, and that they include an inability to have any child or children, these facts may also be included in their estimate, if they further believe from the evidence that such permanent injury, including such inability, resulted from such wrongful acts.[59]

§ 954. **Inability to Work in Any Capacity—Acting as Housewife—Postponement of Marriage.** If her injuries were such as would preclude her earning anything in the future, or would preclude her working in any capacity—acting as a housewife,—of course, that is a matter for you to take into consideration. I do not mean to say that if she were to be married it would be expected that she would earn by working in a store, as she has in the past; still she might be physically unable to do housework. It is quite possible, gentlemen, of the jury, that the injuries are such, and you may find them (from the evidence) to be such, because the extent of the injuries is wholly

severe or injurious to herself by some voluntary act which it was her duty to refrain from, or if by her neglect to exert herself reasonably to limit the injury and prevent the damages, in the cases in which the law imposes that duty, and thereby she suffered additional injury from the defendant's act, evidence is admissible in mitigation of damages to ascertain to what extent the damages claimed are to be attributed to such acts or omissions of the plaintiff. It is a question of negligence, and the measure of duty is ordinary care and diligence in the adoption of such measures of care or prevention as the case required and were within her knowledge or power. 1 Suth. Dam. § 155. It does not appear that her medical adviser gave her any caution to avoid sexual intercourse, or even pregnancy, nor is there any evidence to show that she knew or understood that the nature of her injury was such that it was not prudent that she should do so. The mere fact that eight weeks after the injury pregnancy occurred, and when no caution in that respect appears to have been given by her medical adviser, is not necessarily and as a matter of law sufficient ground to justify a reduction of damages for the injury caused by the defendant's negligence, although the results of the injury may have been thereby prolonged, or her recovery delayed."

59—Normile v. Wheeling T. Co., 132 W. Va. 57, 49 S. E. 1031 (1033 and 1034).

"Complaint is made that the jury should have been told in this instruction that such damages could not be properly included in their estimate unless the evidence showed that the injury in question was the reasonable and probable consequence of the defendant's negligence. While this instruction does not, in express terms, so instruct the jury, yet the language used in the instruction is sufficient to guide the jury to a proper conclusion in this respect. They are told that they can consider this feature of the injury if it resulted from the wrongful act of the defendant—not that if it is a reasonable and probable consequence of

for you and not for me—as to preclude her from being married for perhaps some time.[60]

§ 955. **What to Consider in Assessing Damages—Injury to Minor.** (a) The jury are further instructed by the court that, if they believe from the evidence that the defendant company is liable in this action, then, in estimating said damages, they should take into consideration the bodily injury, if any, sustained by the plaintiff, the pain and suffering undergone, the effects on the health of the sufferer, according to its degree, and its probable duration as being temporary or permanent, and the pecuniary loss sustained by the plaintiff through his inability to attend to his business affairs after his arrival at the age of 21 years.[61]

(b) If the jury finds a verdict in favor of the plaintiff, it should assess his damages at such an amount as the jury believe, from the evidence, will be a fair compensation to plaintiff. First, for such a sum as he reasonably incurred for medicines, hospital charges, drugs and appliances in the treatment of his said son, occasioned by said injuries; second, for such a sum as it was reasonably worth for the nursing of said son by plaintiff and his wife occasioned by the injuries in question; and, third, for such sum as the jury may believe from the evidence, if any, plaintiff has sustained, or will probably sustain, by way of loss, or partial loss, of services of his said minor son occasioned by said injuries, until he attains the age of 21 years, taking into consideration the earning capacity of the boy in his injured condition, and also the possibility of his death before reaching the age of twenty-one years. And the jury, in assessing the plaintiff's damages, will confine itself to the elements of damages above enumerated, but the total damages allowed, if any, must not exceed the sum of forty-two hundred dollars.[62]

(c) The court instructs the jury that the plaintiff cannot recover

the negligent act, but, as a matter of fact, if the loss of child-bearing was the result of the defendant's wrongful act, the jury were told that they could consider this in estimating the damages. For the reasons given we find no fault with this instruction."

60—Remey v. Detroit United Co., 141 Mich. 116, 104 N. W. 420 (421).

"Defendant contends that the court erred in giving the foregoing instruction, because there was no evidence whatever of the value of plaintiff's earnings. This objection proceeds upon the assumption that this instruction, properly construed, permitted the jury to give compensation for the value of earnings lost by plaintiff as a housewife. This is, in our judgment, a mistaken construction of the charge. The jury are not told to make allowance for earnings, but to consider plaintiff's incapacity to do work as a housewife, and this in connection with the statement that they may find plaintiff's injuries may preclude her from being married for some time. The effect of this instruction is to say to the jury that they may consider plaintiff's impaired capacity to act as a housewife, in determining whether her injuries are such as to postpone her marriage. This is not error, if plaintiff had a right to damages for the postponement of her marriage."

61—Approved in Richmond T. Co. v. Wilkinson, 101 Va. 394, 43 S. E. 622; also in Washington A. & Mt. V. E. Ry. Co. v. Quayle, 95 Va. 741, 30 S. E. 391 (394).

62—See note 63.

in this action for the present condition of the plaintiff's son, A. B., if you believe and find from the evidence that the second injury or breaking of the limb was caused by the carelessness of the said A. B. himself, and you believe from the evidence that the present condition of said A. B. is the result of such second injury.[63]

(d) If you find for the plaintiff, and believe from the evidence that he was injured as alleged in his petition, you should allow him such sum as you believe from the evidence will compensate him for the injuries sustained, if any; and, in estimating his damages, you may take into consideration the mental and physical pain suffered, if any, consequent upon his injuries, if any; and if you believe from the evidence that his injuries, if any, are permanent, and will disable him to labor and earn money in the future, then you may allow him such sum, if paid now, as you believe from the evidence will be fair compensation for his diminished capacity, if any, to labor and earn money in the future.[64]

§ 956. Such Damages as Will Actually Compensate to Be Allowed —Minor. (a) If you find for the plaintiff, you will allow him such sum as will now actually compensate him in cash for the injury he has sustained on account of being thrown from the train (if he was so thrown), taking into consideration the physical pain and mental anguish (if any) that he has suffered and will suffer in consequence of said injury. And if you further believe that, in consequence of his injuries (if any) as a result of his fall (if he fell), his ability to labor and earn money after he arrives at the age of twenty-one years has been lessened, then you will allow him such sum as will now reasonably compensate him in cash for such disability to labor after he arrives at the age of twenty-one years, but you will not allow him anything for disability to labor before he arrives at that age.[65]

63—Baxter v. St. L. T. Co., 103 Mo. App. 597, 78 S. W. 70 (73).

"We think the two instructions on the measure of damages were eminently proper under the evidence, and entirely fair to both sides."

64—Galveston H. & S. A. Ry. Co. v. Jones, 29 Tex. Civ. App. 214, 68 S. W. 190 (191).

"This charge," said the court, "gave the true measure of damages, did not allow double damages and is broad enough in its terms to include ability to earn money in any capacity."

65—St. L. S. W. Ry. Co. v. Byers, — Tex. Civ. App. —, 70 S. W. 558 (560).

"Literally and strictly, compensation for the injury received may be said to include compensation for diminished ability to labor, but it is manifest that no intelligent juror would understand the charge to mean that the court directed him to allow compensation twice on account of plaintiff's diminished capacity to labor. The clear intention of the court was that the jury should award simple compensation for the damage sustained, and attention was properly called to the fact that in estimating the damage the jury should take into consideration the physical pain and mental anguish suffered, and also the lessened ability of the plaintiff to labor and earn money. The charge carefully guarded the rights of the defendant, especially in the latter respect, and it was evidently in the effort to do so that the court was led into framing the charge in the form which gives rise to the complaint we are considering. The complaint is not well taken, and the assignment is overruled."

(b) If you find for the plaintiff you will assess his damages at such a sum of money as in your opinion will be a reasonable and just compensation for the injuries he has sustained. In estimating the damages, you will take into consideration the physical and mental pain, if any, he has sustained by reason of such injuries, if any; and if you believe from the evidence that plaintiff has not yet recovered, and that his injuries are permanent, and that he will hereafter suffer pain and anguish therefrom, and that his ability to labor and earn money subsequent to his majority is and will be impaired by reason of said injuries, if any, then you will take this into consideration in estimating the damages; but you will exclude from your consideration any loss or impairment of earning power, if any, during his minority.[66]

§ 957. **Measure of Damages Where Minor is Too Young to Have Selected An Avocation.** Where a minor has suffered permanent injury, and such minor is too young to have selected an avocation or to begin to illustrate her earning capacity, in such cases there is no measure as to the amount of damages where such minor is entitled to recover therefor, except the enlightened consciences of impartial jurors, guided by all the facts and circumstances of the particular case.[67]

§ 958. **Minor Cannot Recover Damages for Diminution of Earning Power During Minority, Unless Emancipated.** (a) The court instructs the jury that the minor cannot recover damages on account of the diminution of earning power or capacity during minority, unless emancipation be shown, but they may consider such diminution after he attains his majority.[68]

(b) The court instructs the jury that if you believe the defendant guilty, even then the plaintiff cannot recover in this suit either for medical service or for diminution of earning power during minority, and in this case you are to disregard all evidence tending to prove either the value of medical service or the diminution of earning power during minority.[69]

66—Cameron Mill & Elev. Co. v. Anderson, 34 Tex. 105, 78 S. W. 8.

67—Atlanta K. & N. Ry. Co. v. Gardner, 122 Ga. 82, 49 S. 818.

"In the case of Western A. R. Co. v. Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320 (4), Chief Justice Bleckley said: 'A brief but excellent model of a charge upon the measure of damages, where the subject of the injury was a child, will be found in Davis v. The Central Railroad, 60 Ga. 329.' The charge here referred to and commended was as follows: 'There is no known rule of law by which witnesses can give you the amount in dollars and cents as the amount of the injury, but this is left to the enlightened conscience of an impartial jury. This does not mean that juries can arbitrarily enrich one party at the expense of the other, nor that they should act unreasonably through mere caprice. But it authorizes you to give reasonable damages where the party shows that the law authorizes it. But the jury should exercise common sense and love of justice, and, from a desire to do right, fix an amount that will fairly compensate for the injury received.'"

68—Geibel v. Collins Co., 54 W. Va. 518, 46 S. E. 569 (572).

69—Richardson v. Nelson, 221 Ill. 254 (260), 77 N. E. 583.

§ 959. **Injury to Servant—Violation of Contract to Furnish Medical Attendance.** (a) This is an action of contract, and the burden is upon the plaintiff to prove a contract with the railroad company, and a violation of that contract by the railroad company from which damage resulted to him.

(b) The defendant is not liable for the original injury which the plaintiff claims to have sustained, and cannot in any event be liable unless it is shown that it was by the terms of its contract with the plaintiff bound to transport him to Denver, and put him in a hospital for treatment, if necessary, and that his injuries were such that it was necessary to transport him to Denver and put him in a hospital for treatment, and further that its failure so to do resulted in damage to him.[70]

§ 960. **Injury to Servant—No Punitive Damages—Actual Damages Only.** (a) If you should find that the plaintiff is entitled to any damages you should state how much, and in making up your verdict you can only find such actual damages as may be proved by the evidence. You cannot find any exemplary or punitive damages.[71]

"The appellant insists this instruction cannot cure the defect in instruction No. 2; that the instructions are diametrically opposed and that no amount of reasoning can reconcile them, and that it is impossible to say which instruction the jury followed. Instruction No. 2 tells the jury damages may be assessed for the loss of time and inability to work in the future, and that damages may be assessed if proven, 'so far as such damages are claimed and alleged in the declaration.' The appellee could recover for loss of time and earnings after reaching his majority. That was a proper element of damages. But to have been strictly accurate this limitation should have been recognized, Appellant's instruction supplements instruction No. 2, and plainly advises the jury that damages could not be recovered for medical services and diminution of earning powers during minority. The two instructions considered together are not contradictory or inconsistent. The latter explains the former, and as a series correctly state the rule of liability. The jury were not likely to have been misled. The error was obviated and rendered harmless. T., W. & W. Ry. Co. v. Buckingham, 77 Ill. 309; Galesburg & G. E. Ry. Co. v. Milroy, 181 id. 243, 54 N. E. 939."

70—Denver & R. G. R. Co. v. Iles, 25 Colo. 19, 53 Pac. 222 (223).

"As we read the complaint the cause of action declared upon is the violation by the defendant of a contract. The obligation resting upon the defendant to send plaintiff to its hospital, and furnish him medical treatment, existed, if at all, as the result of a contract so providing, and so far at least as the pleading is concerned no such obligation is claimed independent of the contract. It is nowhere alleged therein that the defendant's duty in this particular arose out of the mere relation of employer and employe, or was incident thereto. From the foregoing it follows that, if the plaintiff fails to prove either the contract or its violation his action fails. That the plaintiff relied upon a breach of contract is further evidenced from the fact that a large part of his testimony consisted of an attempt to show the usage of the company and the contract as pleaded. Such being the cause of action the above instructions, asked by the defendant, should have been given."

71—Florida C. & P. R. Co. v. Mooney, 45 Fla. 286, 33 So. 1010 (1012).

"It was peculiarly appropriate that the requested instruction should be given, in order that the jury should understand not only that their estimate should not include punitive damages, but that it should be based upon actual

(b) If the jury believe from the evidence that on the occasion in controversy plaintiff was injured, and that his injury was the direct and natural result of the gross negligence of defendant's agent and servants in charge of train No. 56, they should find for him such compensatory damages as will fairly and reasonably compensate him for such injuries, not to exceed $20,000, unless they further believe from the evidence that, in receiving his injuries, plaintiff was himself negligent, and that his said negligence, if any, so far contributed to his injuries that he would not have been hurt but for his own negligence, if any.[72]

§ 961. Injury to Employe—What to Consider—Negligence in Moving Car. (a) If you find for the plaintiff, you will return a verdict in his favor for the amount of damages which he has suffered by reason of his injuries; and in estimating such damages you may consider the value of time lost during the period of his disability, and, if you find he has been disabled, his expense for drugs and nursing, if any, and the probable effect of such injuries upon his physical condition and his ability to earn money and pursue the course of life for which he was fitted and suited, and a fair compensation for mental suffering and physical pain caused by such injuries; and, if you find for the plaintiff, the form of your verdict will be, We, the jury, find for the plaintiff, and assess his damages at ———— dollars.[73]

damages shown by the evidence. The statement of facts following the refused instruction shows an entire absence of testimony tending to authorize the infliction of punitive damages, and this being so, it was not improper that the court should instruct the jury that no such damages should be allowed. C. St. L. & N. O. R. Co. v. Scurr, 59 Miss. 456, 42 Am. Rep. 373; L. & N. R. Co. v. Hall, 87 Ala. 708, 6 So. 277, 4 L. R. A. 710, 13 Am. St. Rep. 84.

"The rule in this respect would be different if there was any evidence whatever tending to show that punitive damages could be properly inflicted, even though the court might be of opinion that the preponderance of evidence was the other way, for in such case the court should by proper instructions leave the question to be decided by the jury, like any other fact depending upon conflicting testimony. But where there is no evidence tending to show negligence of so gross a character as to warrant the infliction of punitive damages, as is shown to be the case here by the predicate of facts following this refused instruction, the court should not refuse an appropriate instruction withdrawing such question from the consideration of the jury. What is here said is not intended to deny the rule announced in F. C. & P. R. Co. v. Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. S. R. 149, that the jury are to exercise a reasonable discretion as to the amount of damages to be awarded based upon the facts in evidence, and the knowledge and experience possessed by them in relation to matters of common knowledge and information; nor is it now decided that if correct instructions are given as to the measure of damages to be awarded error can be predicated upon the refusal to give an instruction that the jury cannot award exemplary or other special items of damage, not properly recoverable in a particular case, even though the general instructions do not specially mention and exclude such improper items. The matter decided is that where no instructions are given as to the measure of damages it is error to refuse a correct instruction requested, confining the jury to the proper measure and to the evidence in ascertaining the amount."

72—L. & N. Ry. Co. v. Hiltner, 22 Ky. 1141, 60 S. W. 2 (4).

73—Gulf C. & S. F. Ry. Co. v.

(b) If you find that S. was a vice principal of the defendant, as that has been explained heretofore; and if you further find that W. was not guilty of contributory negligence; and if you further find that at the time of the injury to said W. he was working under the car, or between the car and the platform, and that this position was one of danger, and that the said S., without any warning or notice to said W., caused said car to be removed, without first having given the said W. warning or notice, and that the said W. did not know that the said car was going to be moved, so as to enable him to remove himself from between the car and the platform, or from his position of danger, before the moving of said car, thereby causing the said W. to believe that his life was in danger, or that he was in danger of serious bodily injury, and that while in such real or apparent danger he attempted to escape, and was caught between the car and the platform, and was mashed and injured, from which injuries he died; and if you further find from the facts and circumstances that the said S. was guilty of negligence, as explained to you, by causing said car to be moved at the time and in the manner it was moved, and that such negligence was the cause of the injury, and said injuries caused the death of W., then you will find for the plaintiffs such actual damage, if any, as will compensate them for the pecuniary loss, if any, resulting to them by the death of the said W.[74]

§ 962. **Master and Servant—Injury to Employe—Gross Negligence Defined—Contributory Negligence—Punitive Damages—Series.** (a) The court instructs the jury that gross negligence is the failure to take such care as a person of common sense and reasonable skill in like business, but of careless habits, would observe in avoiding injury to his own person or life under circumstances of equal or similar danger to the plaintiff on the occasion under consideration.

(b) The court instructs the jury that the plaintiff in this action makes two complaints against the defendant, to wit: First, for the injury to his big toe on the occasion occurring on the switch track of defendant; and, secondly, for the injury occurring under defendant's engine, when he lost his legs. The court instructs you that under the undisputed facts and the law of this case said two occasions and injuries occurring thereat are separate and distinct from each other, and each claim for damages by reason of said injuries is separate and distinct, and they are not to be blended in law as only one entire transaction.

(c) The court further instructs the jury that, if you shall believe from the evidence in this case that the injury to plaintiff by the

Warner, 22 Tex. Civ. App. 167, 54 S. W. 1064 (1066).

74—H. & T. C. R. Co. v. White, 23 Tex. Civ. App. 280, 56 S. W. 204 (208).

"This instruction, said the court, simply applies the law to the very facts of the case. M. K. & T. R. R. Co. v. McGlammory, 89 Tex. 639, 35 S. W. 1058; St. L. S. W. R. R. Co. v. Casseday, 92 Tex. 525, 50 S. W. 125; G. C. & S. F. R. Co. v. Shieder, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538."

mashing of his big toe on the switch track complained of of the defendant was occasioned by the gross negligence of defendant's agent, M., in charge of the engine at that time, then the law is for the plaintiff and the jury should so find; and you will, as to this injury, find whatever damages you may consider he sustained by reason thereof for his bodily and mental suffering resulting from said injury received, including any loss of time on account thereof; and, in addition to such compensatory damages, you may, in your discretion, give punitive damages for whatever sum you may believe is just and right for said injury to plaintiff's big toe.

(d) The court further instructs the jury that if you shall believe, from the evidence in this case, that the injury to the plaintiff of the loss of his two legs complained of was occasioned by the gross negligence of defendant's agent and employe M., its engineer, in operating its engine at the time, the law is for the plaintiff, and you will find for the plaintiff such damages as the proof shows he sustained, and in estimating the amount of damages you should take into consideration the age and situation of the plaintiff, his earning capacity and its probable duration, his bodily suffering and mental anguish resulting from the injury received, and the loss sustained by the want of the limbs injured, and the extent to which he is disabled from making a support for himself by reason of the injury received. And you may, in addition to such compensatory damages, give punitive damages, in your discretion, not exceeding, however, for all injuries complained of in this action, the amount claimed in the plaintiff's petition.

(e) The court further says to the jury that, as to the question of contributory negligence of the plaintiff pleaded by defendant in its answer, the court will instruct the jury that it was the misfortune of the plaintiff himself that he fainted and fell off the footboard in front of the engine, and for which the defendant was not responsible, and which fall to the ground should not be imputed to the plaintiff as contributory negligence in the eye of the law if he was unconscious at the time, although, but for which fall, he would not have sustained the injuries complained of; and the court further instructs the jury that the responsibility of the defendant for plaintiff's loss of his limbs could not and did not commence until after plaintiff's fall, and not until the engineer had actual notice of his fall and of the fact of his peril; then it was that the law devolved upon said engineer the duty to then do what he could to save the plaintiff from injury; and now, if the jury shall believe from the evidence in this case that he did then act promptly at once, and obeyed the meaning of the signals then given him by the fellow laborers of the plaintiff, and that in good faith he tried to save the plaintiff, and used the means to do so which were reasonable, and which appeared to him at the time most reasonable, then, and in such case, gross negligence is not to be imputed to said engineer, and the law would be for the defendant, and you should so find as to

plaintiff's loss of his legs. But, on the contrary of the foregoing, if the jury shall believe from the evidence in this case that when the said engineer had said notice of the peril of the plaintiff he did not then act promptly at once, and obey the meaning of the signals then given him by the fellow laborers of the plaintiff, and that in good faith he did not try to save the plaintiff, and use the means to do so which were reasonable, and which appeared to him at the time most reasonable, then, and in such case, gross negligence may be imputed to him, and you will find for the plaintiff as instructed in the instructions Nos. 3 and 4 hereinbefore given.

(f) The court instructs the jury that it was the duty of the plaintiff to use ordinary care to prevent injury to himself from the causes complained of by him in his petition, and that if they believe from the evidence he failed to do so, and was guilty of negligence, which contributed directly to his injury, and but for which he would not have been injured, the law is for the defendant, and the jury will so find.

(g) The court instructs the jury that, at the time of the injury complained of by plaintiff, the plaintiff, F. S., and the switchman, C. H., were co-employes in the same grade of service; neither of them being the superior of the other. The plaintiff cannot recover damages against the defendant for any injury sustained by him by reason of the negligence of the said C. H.

(h) The court further instructs the jury that if you shall believe from the evidence that said engineer, M., did not know the plaintiff was under said engine and in peril until notified by the other switchman, H., and if you believe from the evidence that the wheel of the engine had already crushed one of plaintiff's legs, then, as to the injury to that leg, if you believe it was then already inflicted, the defendant should not be held liable, although you may believe from the evidence that thereafter the plaintiff's other leg was crushed by reason of the gross negligence of said engineer, M. (if you believe from the evidence he was guilty as to it).[75]

75—Ill. C. R. Co. v. Stewart, 23 Ky. Law 637, 63 S. W. 596 (598-9).

"The above is a clear and correct statement of the law of the case. The definition of gross negligence was approved by this court in L. & N. R. Co. v. McCoy, 81 Ky. 403; L. & N. R. Co. v. Moore, 83 Ky. 675; L. & N. R. Co. v. Mitchell, 87 Ky. 327, 8 S. W. 706; L. & N. R. Co. v. Earl's Adm'x, 94 Ky. 368, 22 S. W. 607; L. & N. R. Co. v. Long, 94 Ky. 410, 22 S. W. 747; and in these cases a number of earlier decisions are referred to, and it was also held that, where gross negligence was shown, punitive damages might be allowed. This rule has been so often followed and approved by this court in subsequent cases that it is not an open question. We are referred to L. & N. R. Co. v. Kingman, 18 Ky. Law 82, 35 S. W. 264, and McH. Coal Co. v. Sneddon, 98 Ky. 686, 34 S. W. 228, 30 L. R. A. 697, as holding that punitive damages may only be awarded where the conduct of the negligent party is such as to evidence malice, or a reckless disregard of the safety of others, or a wanton injury. The Kingman case is imperfectly reported, and is not marked for publication. The question was not before the court. No reference is made in the other case to

CIVIL ASSAULT.

§ 963. Injuries From Assault and Battery—What to Consider—Smart Money. The jury are instructed that if you believe from the evidence that the defendant assaulted and beat the plaintiff in the manner and form as charged in the declaration, and that the plaintiff sustained damages thereby, then the jury are instructed that they should find a verdict in favor of the plaintiff, and assess his damages at such sum as they believe from the evidence he is reasonably entitled to, and in this respect you are further charged that it is not necessary that any sum should have been named or mentioned in the evidence. The amount of damages, in case you find for the plaintiff, you are to ascertain, basing your finding upon the extent of the plaintiff's injuries, if any such are shown by the evidence, both his injuries received at the time of the assault and battery, and any permanent injuries resulting therefrom, that the jury may believe from the evidence he has sustained. These are known as actual damages. And in case the jury believe from the evidence that the assault was wanton, reckless or vicious, and uncalled for in its character, then the jury may add to such actual damages, if any such they find, such a sum as they may believe from the evidence would be reasonable and just, as smart money or punishment.[76]

§ 964. Punitive Damages in Civil Action of Assault. (a) The jury are instructed that if they find that the defendant was actuated by a hatred or ill will towards the plaintiff, and that the assault, if any, was malicious, you may award the plaintiff such damages as, under the evidence, you think proper, by way of punishment to him for the assault.[77]

the previous reported cases in which the court had expressly held the law to be otherwise and had overruled, Railroad Co. v. Robinson, 67 Ky. 507, in which this rule is enunciated. In both cases, the judgments were reversed for other reasons, and, in so far as they are in conflict with the previous cases as to the allowance of punitive damages in cases of gross neglect, they are overruled."

76—O'Leary v. Zindt, 109 Ill. App. 309 (311).

77—Nichols v. Brabazon, 94 Wis. 549, 69 N. W. 242.

"Punitory damages have been allowed in this state from a very early day in cases where the injury was inflicted under circumstances of aggravation, insult or cruelty, with vindictiveness or malice. McWilliams v. Bragg, 3 Wis. 424. Certainly, there was evidence from which the jury might reasonably have found this injury to have been inflicted from ill will or vindictiveness. The appellant's own testimony is sufficient to show this. His version of the matter is, 'She kicked me, and I struck her.' The blow was in retaliation for the kick. It was a vindictive blow, not necessary for his protection from any threatened or impending injury from her, but purely from vindictiveness. His profession of sorrow immediately afterwards did neither undo the wrong nor atone for it. It was not necessary in order to warrant exemplary damages that the blow should come from ill will or vindictiveness, long harbored; and the present provocation was apparently too inconsequential to fully account for it as a sudden outburst of excusable passion."

(b) If the defendant, without provocation, assaulted and beat the plaintiff, as charged in the declaration, and that such assault was a malicious, wanton and aggravated one; and if the jury further believe, from the evidence, that justice and the public good require it, then the law is, that the jury are not confined in their verdict to the actual damages proven, but they may give exemplary damages, not only to compensate the plaintiff, but to punish the defendant, and to deter others from the commission of like offenses.[78]

(c) To these compensatory damages, in some cases where there is malice premeditated or wantonness in the assault, the jury may add something for exemplary damages, beyond the damages called compensatory, but only so far as to take into consideration the natural expenses of the litigation in excess of the taxable costs, which, of course, would be allowed the plaintiff if he recovers in the case.[79]

§ 965. **Exemplary Damages, Only When Act is Malicious or Wanton and With Wrongful Intent.** The jury are instructed that exemplary or vindictive damages should not be allowed or given in this case, unless the jury find, from the evidence, not only that the defendant is guilty, but also that, it by its conductor, acted maliciously or wantonly and with wrongful intent.[80]

§ 966. **Aggravation of Damages—Mortification of Feeling, Arising From Insult of Defendant's Blow.** That, in an action of assault and battery, the insult and indignity inflicted upon a person, by giving him a blow with anger, rudeness or insolence, constitute an element of damages. And in this case, if the jury believe, from the evidence, that the defendant committed an assault upon the plaintiff, as charged in the declaration, then the jury in assessing damages,

78—Bradshaw v. Buchanan, 50 Tex. 492; Titus v. Corkins, 21 Kans. 722; Brown v. Swineford, 44 Wis. 282.

79—Shupack v. Gordon, 79 Conn. 298, 64 Atl. 740.

The court said that "it is the settled law in this state that in certain cases of tort the amount of expense of the litigation in excess of the amount of taxable costs may be awarded as damages in addition to the damages more strictly called 'compensatory,' and such damages, sometimes called 'exemplary,' cannot exceed the amount of expenses in excess of taxable costs (Wilson v. Granby, 47 Conn. 59, 75; 36 Am. Rep. 51); that in awarding such damages the jury may estimate such reasonable sum as would make the plaintiff good for the expenses of the litigation which he has been obliged to incur in order to obtain redress; and that it is not usual or necessary to introduce evidence to show specifically the amount of such damages (Bennett v. Gibbons, 55 Conn. 450-452, 12 Atl. 99; Maisenbacker v. Society Concordia 71 Conn. 369-378, 42 Atl. 67, 71 Am. St. Rep. 213). The trial court followed this law, and sufficiently complied with the rule as laid down in Hanna v. Sweeney, 78 Conn. 492-494, 62 Atl. 785, and in Hull v. Douglas, 79 Conn. 266, 64 Atl. 351. In speaking of 'the natural expense of the litigation,' the court should be understood as limiting the jury to the consideration of a reasonable expense properly incurred in the litigation. The charge as a whole, including the passages quoted in the appeal, appears to have been substantially correct, adapted to the issue, and sufficient for the guidance of the jury in the case before them."

80—I. C. R. R. Co. v. Latimer, 128 Ill. 163 (172), 21 N. E. 7.

may consider, as an aggravation of the wrong, the mental suffering and mortification of feeling of the plaintiff, arising from the insult and indignity of the defendant's blow.[81]

§ 967. **Damages for Plaintiff's Good Repute, Her Social Position, Sense of Shame, Humiliation, Loss of Honor, etc.** While the jury are not authorized by law to give exemplary or punitive damages in this case in the event a verdict is found for the plaintiff, yet, if the jury find for the plaintiff, full compensatory damages should be awarded; and, in arriving at compensatory damages, the jury are not necessarily restricted to the naked pecuniary loss; for, besides damages for pecuniary loss or injury, the jury may allow such damages as are the direct consequence of the act complained of, for injury to the plaintiff's good repute, her social position, for physical suffering, bodily pain, anguish of mind, sense of shame, humiliation and loss of honor.[82]

§ 968. **Mental Suffering and Mortification of Feeling.** (a) The jury are instructed that in an action of assault and battery, the insult and indignity inflicted upon a person by giving him a blow in anger, rudeness or insolence, constitute an element of damages, and in this case, if the jury believe from the evidence that the defendant committed an assault upon the plaintiff, as charged in the declaration, then the jury, in assessing damages, may consider as an aggravation of the wrong the mental suffering and mortification of feeling of the plaintiff, arising from the insult and indignity of the defendant's blow, if any such is proved.[83]

(b) You may take into their consideration such pain and suffering of the plaintiff as the jury believe from the evidence he may be reasonably certain to suffer in the future.[84]

§ 969. **Mitigation of Damages—Abusive Language Prior to Assault.** The jury are instructed, that while angry and threatening words, and abusive language, are no justification for an assault and battery, still they may be considered by the jury in mitigation of damages, if it appears from the evidence that they were used, and were of such a character as would naturally tend to excite the angry passions of men, and were spoken so recently before the assault complained of as that the hot blood and passion which they were calculated to excite had not had time to cool.[85]

81—Elliott v. Van Buren, 33 Mich. 49.

82—Wolf v. Trinkle, 103 Ind. 355, 3 N. E. 110.

83—Von Reeden v. Evans, 52 Ill. App. 210 (213). Held the objection was not well taken, that this ignored all right of self defense. "The instruction was intended only, and purports only, to advise the jury as to certain elements of damages which they might consider if they find for the plaintiff."

84—Evans v. Elwood, 123 Iowa 92, 98 N. W. 584 (585).

85—Thrall v. Knapp, 17 Ia. 468; Fullerton v. Warrick, 3 Blackf. 219.

CHAPTER XLIV.

DAMAGES, MEASURE OF—NEGLIGENCE CAUSING DEATH.

See Erroneous Instructions, same chapter head, Vol. III.

§ 970. **Fair and Just Compensation, Based Upon Pecuniary Loss.** (a) The jury are instructed, as a matter of law, that if they believe, from the evidence that X——, while in the exercise of ordinary care, and without fault or negligence on his part, lost his life by and through the wrongful act, negligence or default of the defendant, as charged in the declaration, and that said X—— left him surviving next of kin, then the jury should find the defendant guilty, and assess the plaintiff's damages at such sum as they shall believe, from the

evidence, fair and just compensation, based upon the pecuniary loss if any resulting from the death of the said X—— to his next of kin, not exceeding the sum claimed in the declaration filed herein.[1]

(b) The court instructs the jury if you believe, from the evidence, that E——, while in the exercise of ordinary care for her own safety, and without fault or negligence on her part, lost her life by and through the negligence of the defendant, as charged in the declaration, and that said E—— left her surviving next of kin, then you should find the defendant guilty, and assess the plaintiff's damages at such sum as you believe, from the evidence, will be a fair and just compensation, based upon the pecuniary loss, if any, resulting from the death of said E—— to her said next of kin, not exceeding the sum claimed in the declaration filed herein.[2]

§ 971. **Action by Wife for Death of Husband—Expectancy of Life.** (a) The court instructs the jury, that if you find for the plaintiff then in estimating the plaintiff's damages, if any, in this case, you may take into consideration not only the wages and earnings of the plaintiff's husband for any given period as shown by the evidence, so far as you may believe from the evidence that such wages and earnings furnished a means of support for the plaintiff, but also the probable length of the life of said husband till terminated by natural causes, if and so far as it may be shown by the evidence from ———— had he not been killed upon that day.

(b) The court instructs the jury further that they may estimate from all the evidence in the case the prospective length of life of the husband of said plaintiff had he not been killed (if he was so killed on ————), and may take this estimate into consideration together with all other facts and circumstances shown in evidence in fixing the amount of the plaintiff's damages in case the jury find for the plaintiff.[3]

1—Webster Mfg. Co. v. Mulvanny, 168 Ill. 311 (313), aff'g 68 Ill. App. 607, 48 N. E. 168.

"The only objection made by appellant to this instruction is that the word 'based' was improperly used, and that the jury could have added and probably did add in making up their verdict interest and speculative damages to the pecuniary loss. The instruction is not subject to the objection made. . . . There was no error in the giving of this instruction."

2—Calumet St. Ry. Co. v. Van Pelt, 173 Ill. 70 (73), aff'g 68 Ill. App. 582, 50 N. E. 678.

"This instruction is not distinguishable from instructions held to be faultless. N. C. & B. Ry. Co. v. Payne, 59 Ill. 534; Indianapolis & St. L. R. R. Co. v. Estes, 97 id. 471.

3—Betting et al. v. Hobbett, 142 Ill. 72 (78), 30 N. E. 1048.

"Manifestly in the case of the death of the husband the loss to the wife's means of support is co-extensive with the duration of her life, and the general average of the husband's contributions can only be ascertained from proof of his wages and earnings, which furnished her a means of support. We said in Flynn et al. v. Fogarty, 106 Ill. 267: 'It was highly proper to show what the deceased had done in his lifetime,—the character of his business, his habits of industry and thrift, income and all that sort of thing, with a view of determining what he would have probably done in the future had he not been killed. Could it have been known to a certainty what he would have ac-

§ 972. **Death from Negligent Act—Action for the Benefit of Widow and Next of Kin.** (a) If the jury should find, from the evidence, that the defendant is guilty of the wrongful act, neglect or default, as charged in the plaintiff's declaration, and that the same resulted in the death of A., then the plaintiff is entitled to recover in this action for the benefit of the (widow and next of kin of such deceased) such damages as the jury may deem, from the evidence and proofs, a fair and just compensation therefor, having reference only to the pecuniary injuries resulting from such death, to such widow and next of kin, not exceeding the amount claimed in the declaration.[4]

(b) The jury are instructed, that in estimating the pecuniary injury which the widow and children of the deceased have sustained by his death, if the jury believe, from the evidence, that they have sustained any injury for which the defendant is liable, as explained in these instructions, then the jury have a right to take into consideration the support of the said widow and minor children, and the instruction and physical, moral and intellectual training, as well as the ages of the said minor children, so far as these matters have been proved, in determining the amount of damages in this case.[5]

(c) If you find, from the evidence, under the instruction of the court, that the defendant is guilty of the wrongful act, neglect or default, charged in the declaration in this suit, and that the same resulted in the death of the deceased, and that the plaintiff is entitled to a verdict, then the plaintiff is entitled to recover, for the benefit of the widow and next of kin, such an amount as damages as you believe, from the evidence, a just and fair compensation to such widow and next of kin, having reference only to their pecuniary loss, resulting from such death.[6]

§ 973. **Action for Benefit of Widow and Next of Kin—Compensation for Pecuniary Damage Sustained.** The jury are instructed that if you find from the evidence that the defendant is guilty of the negligence charged in either the first or second count of the declaration, and that the same resulted in the death of ———, then the plaintiff is entitled to recover in this action for the benefit of the widow and next of kin of said deceased, such damages as the jury may deem, from the evidence and proof, a fair and just compensation for whatever pecuniary damage, if any, the evidence shows that

complished but for his death, that would have furnished the exact measure of the loss, but as that could not be definitely ascertained, the next best thing was to show the aid and assistance he probably would have rendered her but for his death, and this could only be done by proving his age, physical condition, habits of industry, thrift and so forth above indicated.' We think the instruction was not erroneous."

4—Cooley on Torts, 3d ed. 547; C. B. & Q. R. Co. v. Payne, Adm., 59 Ill. 534; Rafferty v. Buckman, 46 Ia. 195; Steel, etc., v. Kurtz, 28 Ohio St. 191.

5—I. C. R. Co. v. Welden, 52 Ill. 290; Tilley v. H. R. Rd. Co., 29 N. Y. 252; Costello v. Landwehr, 28 Wis. 522.

6—Bell v. C. R. R. Ga., 73 Ga. 520; C. B. & Q. Rd. Co. v. Payne, 59 Ill. 534; C. M. & St. P. R. R. v. Dowd, 115 Ill. 659, 4 N. E. 368; Penn Co. v. Marshall, 119 Ill. 399, 10 N. E. 220.

the said widow and next of kin have sustained by reason of said death, not exceeding $———.[7]

§ 974. **Damages to be Assessed with Reference to Pecuniary Loss Sustained by Wife and Children—What to Consider.** (a) If, under the evidence and instructions of the court, the jury find for the plaintiff, then, in assessing the damages which the plaintiff is entitled to recover, the jury should assess the same with reference to the pecuniary loss sustained by the wife and children of the deceased, and, determining this, you may consider the probable earnings of the deceased, his age, business capacity, experience, habits, health, bodily and mental qualifications, during what probably would have been his lifetime if he had not been killed, so far as these matters have been shown by the evidence; and you may also consider the value his services might have been in the superintendence and attention to and care of his family and the education of his children; but the amount you can allow cannot exceed the sum of $———.[8]

(b) If you find the defendants guilty under the evidence and instructions of the court, then it is your duty to assess the plaintiff's damages, and in assessing the damages, you have a right to take into consideration all testimony bearing upon that question, and allow such damages as you may deem a fair and just compensation, with reference to the pecuniary injuries resulting from the death of the plaintiff intestate, to his widow and next of kin; and in estimating the plaintiff's damages you have the right to take into consideration whatever you may believe, from the evidence, the widow and next of kin might have reasonably expected, in a pecuniary way, from the continued life of the intestate.[9]

(c) If, under the evidence and the instruction of the court, the jury find the defendant guilty, then in assessing the damages which the plaintiff is entitled to recover, the jury should assess the same with reference to the pecuniary loss sustained by the wife and children of the deceased, having regard to the probable earnings of the deceased, taking into consideration the age, business capacity, experience and habits, health, energy and perseverance during what would probably have been his lifetime if he had not been killed, so far as these several matters have been shown by the testimony, and also having regard to the value of his services in the superintendence,

7—E. J. & E. Ry. Co. v. Thomas, 115 Ill. App. 508 (513), aff'd in 215 Ill. 158, 74 N. E. 109.

The appellate court said, "The objection urged against the instruction is that it directs a verdict without the element of the due care of the deceased, which is an essential element of appellee's case. Without going into a discussion of the instructions, it is sufficient to say that an instruction in substance like this one, has been sustained by our Supreme Court in I. C. R. R. Co. v. Gilbert, 157 Ill. 354, 41 N. E. 724."

8—C. R. I. & P. Ry. Co. v. Zernecke, 59 Neb. 689, 82 N. W. 26 (28).

9—C. C. C. & St. L. Ry. Co. v. Keenan, 190 Ill. 217 (220), 60 N. E. 107.

"While this instruction is somewhat involved, we think the jury could not have been misled thereby. It informed them that in fixing the amount of damages, they must be confined to the pecuniary loss shown by the evidence to have

attention to and care of his family, and the education of his children, of which they have been deprived by his death, not exceeding, however, $———.[10]

(d) If, under the evidence and the instructions of the court, you find the defendant guilty, and that the plaintiff has sustained any pecuniary loss from the death of her husband, then, in assessing the amount of such damages, the jury should estimate the same with reference to the fact that it is the legal duty of the husband to provide the wife present support and maintenance in the future, and she is entitled to such a sum as will make her whole in a pecuniary point of view, having reference to the pecuniary advantage which the jury believe, from the evidence, she might reasonably have expected from the continuance of the life of her husband if he had not been killed by the accident in question, not exceeding, however, the sum of $———.[11]

§ 975. **Ill Health of Widow Not to Be Considered in Assessing Damages—Pecuniary Circumstances of Widow and Children.** (a) If you believe, from the evidence, that the widow of the deceased, at the time of his death, and since, by reason of ill-health, has been unable to perform labor to support herself and family, this fact cannot increase or diminish the amount which she is entitled to recover in this suit; and if you should find the issues for the plaintiff, then you are instructed, in the assessment of damages, to disregard all the testimony in the case as to such ill-health.[12]

(b) The pecuniary circumstances of the widow and children, whether they are rich or poor, cannot increase or diminish the amount of damages which the plaintiff is entitled to recover in this suit; and in case the jury find the issues for the plaintiff, in assessing the damages which the plaintiff is entitled to recover, the jury should disregard all testimony and statements of the counsel, as to the pecuniary circumstances of the widow and children.[13]

§ 976. **Loss of Society, Comfort and Care of Parent and Husband.** The jury are instructed that in estimating the pecuniary loss to plaintiffs the jury have a right to take into consideration the loss of society, comfort and care suffered by them in the death of the husband and father.[14]

§ 977. **Loss of Husband and Parent—Elements of Damage.** If your verdict should be for the plaintiffs, you will assess the damage

been sustained by the widow and next of kin by reason of the death of the intestate. Chicago & A. Ry. Co. v. Kelly, 182 Ill. 267, 54 N. E. 979."

10—Baltimore, etc., Rd. Co. v. Wightman, 29 Gratt. 431; Mathews v. Warner, 29 Gratt. 570 (Va.); Cooley Tort, 3d ed., 569.

11—Rafferty v. Buckman, 46 Ia. 195; Nashville, etc., Rd. Co. v. Stevens, 9 Heisk. 12.

12—I. C. Rd. Co. v. Baches, 55 Ill. 379.

13—C. & N. W. Rd. Co. v. Bayfield, 37 Mich. 205.

14—Dyas v. So. P. Co., 140 Cal. 296, 73 Pac. 972 (975).

"This was a proper instruction to be given in cases like the one at bar, as was settled long ago. Beeson v. G. M. Co., 57 Cal. 38, and since approved; Lange v. Schoettler, 115 Cal. 388, 47 Pac.

at such sum as will compensate them for their pecuniary loss resulting from the death of the husband and father. In estimating this loss, it is proper for you to take into consideration the age, health, habits, occupation, expectation of life, mental and physical capacity for and disposition to labor, and the probable increase or decrease of that ability with the lapse of time; his earning capacity; the care and attention, the instruction and training, one of his disposition and character may be expected to give to his family—and thus determine the value of the life. From this amount deduct the personal expenses of deceased, and the balance, reduced to its present value, would be the present amount of your verdict, provided such of the deceased children as were minors at his death or at this time would not be entitled to any compensation on account of death of deceased for a period beyond the time of their attaining their majority.[15]

§ 978. **Action by Administrator—Personal Injuries—Death From Other Cause Before Trial—Mental Suffering of Widow Not Element of Damage.** The jury are instructed that if, under the instructions of the court, and the evidence in this case, they should find the defendant guilty, they should not, in assessing damages in favor of plaintiff, allow anything for mental suffering or damages of any kind pecuniary or otherwise suffered by the widow or next of kin of the said ———, but on the contrary such damages should be limited by the amount of damages which the preponderance of the evidence shows was suffered by the said ———, prior to his death.[16]

§ 979. **Action by Husband for Negligence Causing Death of Wife —Elements of Damages.** (a) In this case the plaintiff's damages, if

139; Harrison v. Sutter St. R. R. Co., 116 Cal. 156, 47 Pac. 1019."

15—St. Louis I. M. & S. Ry. Co. v. Hitt, 76 Ark. 227, 88 S. W. 908 (911).

The Supreme Court said the instruction "properly gave the elements to consider in arriving at the compensatory amount. If the calculation was made, it was useful only to reach the probable amount required to purchase the annuity to represent his income, and from such amount personal expenses were directed to be deducted."

16—Ill. S. Co. v. Ostrowski, Adm'x, 93 Ill. App. 57 (63).

The above instruction was given in a case where the intestate's administrator sued for personal injuries sustained by the deceased. The deceased died about seven months after the injury occurred, but the death was occasioned by an entirely independent source and was not due to the injuries sustained. In the case evidence was admitted showing that the deceased left him surviving three children one of whom was about six and another about seven years of age. This evidence was held by the Appellate Court to be erroneously admitted, but was not held to be reversible error as the instruction above cured the error. The Appellate Court said: "We are of the opinion that in view of the foregoing instruction the jury could not have been led into assessing any damages except such as appellee's intestate would, in the opinion of the jury, have been entitled to recover had he survived. In City of Joliet v. Conway, 119 Ill. 489, the court, referring to a similar instruction, said: 'In this case there is no attempt to show that the family were dependent upon the plaintiff for support, care of maintenance, and the jury, we think, could not have so understood it, especially in view of the fact that the instructions expressly limit the right of recovery to such damages as resulted to the plaintiff alone.'"

any, should be fair and just compensation for the pecuniary injury resulting to the husband and children from the death of X. In no case can the jury, in estimating the damages, consider the bereavement, mental anguish or pain suffered by the living for the dead. The damage is exclusively for a pecuniary loss, not a solace. The reasonable expectation of what the husband and children might have received from the deceased had she lived, is a proper subject for the consideration of the jury, if they find for the plaintiff. What the husband and children might reasonably expect to receive by reason of the services of this woman, in a pecuniary point of view, is to be taken into account in determining the amount of damages, if you find for the plaintiff. It should be said that it is the present worth as a gross sum in money for the loss of the services of this woman that you are to find, if you find a loss. It is that same which, put in money, is a compensation for what you find this woman would reasonably have saved for her family. Of course, in determining this, these things are all to be considered—that is, the age, health, probability of length of life, or death, if she had not died from taking this drug.[17]

(b) If the jury find the issues for the plaintiff, then they should assess the plaintiff's damage at what the jury believe, from the evidence, to be a proper pecuniary compensation for damages to her surviving husband and next of kin, occasioned by her death, not exceeding $———.[18]

§ 980. **Action by Next of Kin—Pecuniary Loss Not Presumed—Must Be Proven—Plaintiff Receiving Pecuniary Aid From Deceased.** (a) The court further instructs the jury that in this case you cannot presume that the next of kin have suffered pecuniary loss because of the death, but the pecuniary loss, if any has been sustained, must be proven; and unless the next of kin for whose use this suit is brought, were in the habit of claiming and receiving pecuniary as-

17—Davis v. Guarnieri, 45 Ohio 470, 15 N. E. 350 (355), 4 Am. St. Rep. 548.

"It impresses us as a sound, clear and considerate statement of the true rule of damages applicable to the case."

18—C., C. C. & St. L. Ry. Co. v. Baddeley, 150 Ill. 328 (335), 36 N. E. 965.

"The objection urged to this instruction is, that in laying down the measure of damages, the pecuniary injuries resulting to the surviving husband from the death of his wife are included, it being contended that the statute by which the right of action in cases of this character is given, limits the recovery to the pecuniary injuries resulting to the wife and next of kin from the death of the deceased. While perhaps a strict and literal construction of the statute might give some support to this contention, we are disposed to adhere to the views expressed in Chicago v. Major, 18 Ill. 349, 68 Am. Dec. 553. There a broader and more liberal construction was adopted and one which gives to a husband a remedy for the death of his wife. We are referred to cases decided in other States where a more restricted construction has been given to similar statutes, but we are better satisfied with the construction of our statute adopted in Chicago v. Major, and under that construction the trial court was justified in giving the instruction under consideration."

sistance of the deceased, your verdict should only be for a nominal sum; but if you find from the evidence that said next of kin were in the habit of claiming and receiving pecuniary aid from the deceased, then your verdict should be for the actual money loss that they sustained by reason of his death, provided you find the issues for the plaintiff.

(b) The court instructs the jury that in case you should find the issues for the plaintiff, your verdict should be only for the pecuniary or money loss sustained by the next of kin, by reason of the death of deceased. In this character of suits you cannot consider as a measure of damages the pain and suffering that deceased underwent, or the bereavement and suffering of the next of kin, by reason of his death.[19]

(c) If you find from the evidence that the defendant is guilty of the negligence charged in the plaintiff's declaration, and that the same resulted in the death of ———, then the plaintiff is entitled to recover in this action for the benefit of the next of kin of said deceased, such damages as the jury may deem from the evidence and proof of a fair and just compensation for whatever pecuniary damage, if any, the evidence shows said next of kin have sustained by reason of said death, not exceeding amount claimed in the declaration.[20]

19—Malott v. Crow, 90 Ill. App. 628 (631).

20—I. C. R. R. Co. v. Gilbert, 51 Ill. App. 404 (406).

The Appellate Court said: "Such an instruction, omitting the words, 'five thousand dollars,' was approved in C., M. & St. P. R. R. Co. v. Dowd, 115 Ill. 659, 4 N. E. 368, and an instruction in substantially the words of the one given in this case was approved in C., B. & Q. R. R. Co. v. Payne, 59 Ill. 534.

"The concluding words, 'not exceeding five thousand dollars,' have been disapproved by this and the Supreme Court, among other cases, in C., R. I. & P. R. R. Co. v. Austin, Adm'x, 69 Ill. 426, and Village of Warren v. Wright, 3 Ill. App. 602.

"The error in this regard was cured by the remittitur from the verdict of $2,500.

"This court in Andrews v. Boidecker, 17 Ill. App. 213, a case similar to this, said: "The jury may assess such damages as will be a just and fair compensation for the pecuniary loss suffered by the next of kin, from the death of the deceased, and in so doing they may take into consideration every reasonable expectation the survivors may have had of pecuniary benefit or advantage from the continuance of his life.' "

On further appeal to the Supreme Court, 157 Ill. 354 (360), 41 N. E. 724, the instruction was again approved. The Supreme Court said: "An instruction almost identical with that given in this case was challenged by the appellant in C. B. & Q. R. R. Co. v. Payne, 59 Ill. 534, and it was held, 'The point of this instruction is the measure of damages, and in this respect is entirely correct. But appellant's counsel insists that it is wrong because it withdraws from the jury all consideration of the conduct of deceased. We do not think the instruction obnoxious to criticism as claimed.' Instructions like the one now under discussion were before this court in Chi. M. & St. P. Rd. Co. v. Dowd, 115 Ill. 659, 4 N. E. 368; Penn. Co. v. Marshall, 119 Ill. 399, 10 N. E. 220; and C. M. & St. P. Rd. Co. v. O'Sullivan, 143 Ill. 48, 32 N. E. 398; in each of which it was held to relate solely to the measure of damage. An examination of these cases will show there is no conflict in the opinions of this court as to instructions of the character of the one given in this case for the plaintiff.

(d) The court instructs the jury that if you find a verdict in favor of the plaintiff, then, in assessing the plaintiff's damages, you may consider the pecuniary benefits which the plaintiff may have derived from the deceased if he had not been killed, at any age of deceased's life, provided you further find, from the evidence, that the plaintiff is the next of kin, dependent upon deceased for support.[21]

§ 981. **Nominal Damages Only—Where No Pecuniary Loss, Under Statute in Illinois, Representative of Deceased Sues.** The court instructs the jury that, under all the evidence offered in this case, the jury will not be warranted in assessing any more than nominal damages against the defendant.[22]

§ 982. **Only Such Damages Allowed as Shall Make Good the Actual Pecuniary Loss—Sustained by Next of Kin.** The jury are instructed that if you shall find for the plaintiff in this case, you can only allow such damages as shall make good the actual pecuniary loss sustained by the next of kin of the person deceased, and that the sorrow or mental suffering or grief of his said next of kin are not proper elements to be considered by the jury in the calculation of damages. You must ascertain from the facts and circumstances in evidence the actual pecuniary loss sustained by said next of kin as nearly as they can approximate thereto, and this pecuniary loss as found by you from the evidence must be the sole measure of damages.[23]

§ 983. **Measure of Damages for Death of Minor Child.** (a) If you find a verdict in favor of plaintiff, you are not confined in assessing the damage, to the pecuniary value of the services of the deceased child to his next of kin until he would have arrived at the age of 21, but the jury may consider the pecuniary benefit which the next of

It relates solely to the measure of damage, and need not incorporate the requirement that plaintiff was in the exercise of due care and caution. It was not error to give it."

21—O'Fallon Coal Co. v. Laquet, 198 Ill. 125, aff'g 89 Ill. App. 13, 64 N. E. 767.

22—Street R. R. Co. v. Brodie, 156 Ill. 317 (318), rev'g 57 Ill. App. 564, 40 N. E. 942.

"The statute (Hurd's Statutes, chap. 70, p. 781) providing that the action shall be brought in the name of the personal representative of the deceased person, and the amount recovered shall be for the benefit of the widow and next of kin of the deceased person, 'and in every such action the jury may give such damages that they may deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person not exceeding $5,000,' has been before the court for consideration in a number of cases, and it has been uniformly held that damages can only be recovered for the pecuniary loss; that damages for the bereavement, for pain and suffering,—damages by way of solatium,—cannot under this statute be recovered. Chicago v. Major, 18 Ill. 349; Chi. & R. I. Rd. Co. v. Morris, 26 Ill. 40; C. & A. R. R. Co. v. Shannon, 43 Ill. 338; Conant v. Griffin, 48 Ill. 510; I. C. R. R. Co. v. Baches 55 Ill. 379; C., B. & Q. Rd. Co. v. Harwood, 80 Ill. 88; Holton v. Daly, 106 Ill. 131. Under the rule established by the cases cited, the plaintiff having sustained no pecuniary loss was entitled to recover nominal damages only."

23—C. & G. T. Ry. Co. v. Kinnare, 115 Ill. App. 132 (134).

kin might have derived from said deceased, had he not been killed, at any age of his life.[24]

(b) If the jury find for the plaintiff, in estimating the damages sustained by the next of kin of the deceased by reason of his death, the jury can only estimate the damages to the brothers and sisters of deceased at such a sum as the evidence shows they have sustained by the death of deceased, and can only estimate the damages to the father of deceased upon the basis of what the son's services would have been worth to his father from the date of the injury to the time he would have arrived at the age of twenty-one years, deducting therefrom the costs and expenses of the father in his support and maintenance during that time; and if the evidence does not show the ages of said brothers and sisters nor that they were receiving support from him, or were in condition to require it, then the jury can only estimate the damages to said brothers and sisters at a nominal sum.[25]

(c) The court instructs the jury that, in case they find for the plaintiff, they can only assess pecuniary damages for pecuniary loss—that they cannot give any damages for the grief and mental suffering of the father and mother, or any one else. The damages, if any, must be confined to the pecuniary loss which the evidence may show has been sustained by the father and next of kin, and should be such compensation under the statute as the jury may believe from the evidence is just and right.[26]

§ 984. Age of Child, Its Physical and Mental State, Probability of Living to Majority, and Probable Aid, etc., to Father in Future Years. In determining the value of said services, you are to take into consideration all the circumstances of the case, such as the age of the child, and its physical and mental state, the probability that it would have lived to reach its majority, and the probable aid, assistance, society and comfort it would have been able to give to the father in future years.[27]

24—U. S. Brewing Co. v. Stoltenberg, 211 Ill. 531 (534-5), aff'g 113 Ill. App. 435, 71 N. E. 1081.

"This instruction is exactly the same as an instruction which was approved by this court in the case of B. & O. S. W. Ry. Co. v. Then, 159 Ill. 535, 42 N. E. 971. The only difference between the instruction in the Then case and that in the case at bar is that, in the former, the words 'may have derived' are used, while in the latter the words 'might have derived' are used. The difference between the two instructions is a mere matter of grammar, and does not affect the meaning. The instruction in the Then case was referred to with approval in the recent case of No. C. St. R. R. Co. v. Johnson, 205 Ill. 32, 68 N. E. 463."

25—Wabash R. R. Co. v. Smith, 162 Ill. 583 (588), aff'g 58 Ill. App. 419, 44 N. E. 856. But see W. C. St. R. R. Co. v. Dooley, 76 Ill. App. 424.

26—I. C. R. R. Co. v. Reardon, 157 Ill. 372 (378), aff'g 56 Ill. App. 542, 41 N. E. 871.

"That the loss of the right to receive his wages until majority is not the only element of pecuniary loss or the only thing to be considered by the jury in assessing damages, is settled by the repeated decisions of this court. City of Chicago v. Keefe, 114 Ill. 222, 2 N. E. 267; I. C. R. R. Co. v. Slater, 129 Ill. 91, 21 N. E. 575, 6 L. R. A. 418, 16 Am. St. Rep. 242; Chicago v. Sholten, 75 Ill. 468."

27—Corbett v. Oregon S. L. R. Co., 25 Utah 449, 71 Pac. 1065.

§ 985. **Injury to Servant Causing Death.** (a) If the jury believe from the evidence that the plaintiff is entitled to recover, she is entitled to recover an amount equal to J. J. pecuniary worth to his family who were dependent upon him from the time of his death to this time, added to the present cash value of his pecuniary worth to his said family during the balance of his expectancy of life.[28]

(b) The court instructs you that in fixing the amount of your verdict you will allow them such a sum of money as you find from the evidence will be a fair compensation to them for the pecuniary loss, if any, sustained by them in the death of G. W. J., separating by your verdict the sum, if any, you allow to plaintiff E. J. for herself, and the sum, if any, for the benefit of her daughter F. J.[29]

(c) Should your verdict be for plaintiffs, you should find for them in such an amount as you believe from the evidence that, if paid now, will fairly and reasonably compensate them for such support and maintenance as the decedent, if he had lived, would have given to T. and M., if any, and for such an amount as the decedent, if he had lived, would have expended for the education of M. and T., if any.[30]

"Complaint is made that this language 'assumes as a settled fact that the child would have done all it might have been able to do had it lived.' While this part of the instruction is to some extent open to criticism, yet when read in connection with other parts of the same instruction, we do not think it probable that the jury was misled. For instance the court restricted the recovery to a 'just compensation' for the 'pecuniary loss thereby sustained' and 'pecuniary compensation to the father for the loss which he may have sustained.' Neither was it error to authorize a recovery for the pecuniary loss sustained for the loss of service of the child, including society and comfort; the instruction expressly excluding any recovery for sorrow, grief or anguish the parents or either of them, may have sustained, or any pain or suffering that may have resulted to the child. Pool v. Railway Co., 7 Utah 303, 26 Pac. 654; Hyde v. Ry. Co., 7 Utah 356, 26 Pac. 979; Wells v. Ry. Co., 7 Utah 482, 27 Pac. 688; Chilton v. Ry. Co., 8 Utah 48, 29 Pac. 963; Munro v. Pac. Coast Dredging & R. Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248; Lange v. Schoettler, 115 Cal. 391, 47 Pac. 139; Green v. Railway Co. — Cal. —, 67 Pac. 4; Denver Cons. Tr. Co. v. Riley, 14 Colo. App. 32, 59 Pac. 476; F. Cent. & P. R. Co. v. Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149.

28—Ala. M. R. Co. v. Jones, 114 Ala. 519, 21 So. 507 (511), 62 Am. St. Rep. 121.

"The measure of damages in cases of this character, viz., where the next of kin were dependents, and all earnings were consumed in the support of the family, will be understood by consulting the following authorities: L. & N. Co. v. Trammell, 93 Ala. 350, 9 So. 870; McAdory v. L. & N. R. Co., 94 Ala. 272, 10 So. 507; Bromley v. Birmingham Mineral R. Co., 95 Ala. 397, 11 So. 341; Louisville & N. R. Co. v. Markee, 103 Ala. 160, 15 So. 511, 49 Am. St. Rep. 21; Alabama G. S. R. Co. v. Hall, 105 Ala. 599, 17 So. 176."

29—G. H. & S. A. Ry. Co. v. Johnson, 24 Tex. Civ. App. 180, 58 S. W. 622 (623).

30—G. H. & S. A. R. Co. v. Puente, 30 Tex. Civ. App. 246, 70 S. W. 362 (364).

In comment the court said the "language of the statute is: 'The jury may give such damages as they may think proportionate to the injury resulting from such death.' It does not limit the damages to such as accrue during the minority of the children of the deceased. Nor are they tied down to any precise rule within the limit of the statute as to the amount and species of injuries sus-

§ 986. **Should Consider Age, Society to Family; also Solace and Comfort, etc.** (a) The jury must found their estimate of the amount of such loss upon such facts in proof as tend to show the extent of the pecuniary loss sustained, taking into consideration the age of the deceased, and all such other evidence as may afford them the means of making the estimate.[31]

(b) The jury are instructed by the court that if you shall find for the plaintiff, in estimating his damages you may take into consideration compensation for the loss of his care, attention, and society to his family together with such sum as they may deem fair and just by way of solace and comfort to them for the sorrow, suffering and mental anguish occasioned by his death, not to exceed, however, the sum of $———.[32]

§ 987. **Reasonable Probabilities of Life—Damages Past and Prospective—Apportionment Among Plaintiffs.** (a) If the court sitting as a jury find for the plaintiffs it is to estimate the reasonable probabilities of the life of the deceased, S., and give the equitable plaintiffs such pecuniary damages, not only for past losses, if the court sitting as a jury finds any loss, but for such prospective damages as it may find they have suffered or will suffer as the direct consequence of the death of the said plaintiff.

(b) If the court sitting as a jury shall find for the plaintiffs, then, in awarding the damages to which the plaintiffs are entitled, it must apportion them among the equitable plaintiffs in such shares as it shall find and direct.[33]

§ 988. **An Instruction on the Measure of Damages Need Not Include All the Elements Necessary for Recovery.** If the jury find, from the evidence, and under the instructions of the court, that the defendant corporation is guilty of the wrongful acts, neglect or default as charged in the plaintiff's declaration, then the plaintiff is entitled to recover such damages as the jury may deem from the evidence

tained. The matter is to be submitted to their sound judgment and sense of justice. They must be satisfied that pecuniary injuries resulted. If so satisfied, they are at liberty to allow them, from whatever source they actually proceed which could produce them. If they are satisfied from the history of the family, as intrinsic probabilities of the case, they were sustained by the loss of bodily care, or intellectual culture or moral training, which the parent had supplied, or would, from the duties growing out of the relationship, probably supply, they are at liberty to allow them. Mo. Pac. R. Co. v. Lehmberg, 75 Tex. 61, 12 S. W. 838; Texas Pac. R. Co. v. Lester, 75 Tex. 56, 12 S. W. 955. The children were respectively 18 months and two and one-half years old when their father was killed. It was his duty to support, maintain and educate his children; and it may be presumed that he would have continued to discharge this duty, had he lived. We do not think that appellant can justly complain of this part of the charge."

31—City of Chicago v. Major, 18 Ill. 349.

32—B. & O. R. R. Co. v. Noell's Adm'r, 32 Grat. Va. 394; Portsmouth St. R. Co. v. Peed's Adm'r, 102 Va. 662, 47 S. E. 850 (852).

33—Western M. R. Co. v. State, 95 Md. App. 637, 53 Atl. 969.

and proof a fair and just compensation therefor, having reference only to the pecuniary injuries resulting from such death to the said plaintiff and next of kin not exceeding the amount in the declaration. Sorrow or grief for the deceased, or any pain caused to the next of kin by reason of the manner of his death is not to be considered by the jury, and the pecuniary value of the life of the deceased to the next of kin, him surviving, is all for which damages can be assessed.[34]

§ 989. **Damages Not to Exceed a Certain Specified Amount.** The jury are instructed that, if they find for the plaintiff, they must assess the plaintiff's damages at such sum as will be a fair compensation, with reference to the pecuniary injuries resulting from such death to the widow and next of kin of J., deceased, not exceeding the sum of $5,000.[35]

34—C. M. & St. P. Ry. Co. v. O'Sullivan, 143 Ill. 48 (51), 32 N. E. 398.

"If it was an instruction that purported to state hypothetically the elements necessary to constitute a cause of action, it would manifestly be bad, for it omits the requirement of ordinary care, wholly ignores the question of contributory negligence and does not even require the jury to find that the negligence of the plaintiff resulted in the death of the deceased. It is not, however, an instruction of that kind, but relates merely to the measure of damages in the event a legal right of recovery is shown. The declaration alleges the negligent acts of appellant, that the death of the intestate was caused thereby, and that said intestate, at the time he was killed, was in the exercise of due care. The court instructed the jury that if they believed, from the evidence, that the plaintiff had made out his case as laid in his declaration, then they should find for the plaintiff. This imposes on the plaintiff the burden of establishing all three elements necessary to constitute the cause of action,—the negligence, the consequent death, and ordinary care on the part of the deceased. Then followed the instruction in question in regard to the damages to be assessed, if the jury found the defendant guilty as charged in the declaration. The instruction is almost identical with those passed on by this court in C. B. & Q. R. R. Co. v. Payne, 59 Ill. 534; in C. M. & St. P. Ry. Co. v. Dowd, 115 Ill. 659, 4 N. E. 368, and in Penn. Co. v. Marshall, 119 Ill. 399, 10 N. E. 220, and in all three of said cases held to be an instruction not to be regarded as one stating the law in regard to negligence, but simply as one relating to the measure of damages in case the plaintiff should recover, and also held not to be erroneous. The only difference between the instructions involved in these cases and that now at bar is that here the fact of the death of the intestate was caused by the negligence not stated in the instruction,—which makes it still more plain that it was not the office of the instruction to lay down any hypothesis that would be the basis of a right of recovery in the administrator of the deceased."

35—L. S. & M. S. Ry. Co. v. Parker, 131 Ill. 557, 23 N. E. 237.

"It seems to be thought that this instruction is subject to the same objection sustained by this court to that given in C. R. I. & P. R. R. Co. v. Austin, admr., 69 Ill. 426. That instruction was as follows: 'The jury are instructed that by the statute of Illinois the plaintiff in this case cannot recover more than $5,000; and if they believe, from the evidence, that the plaintiff is entitled to recover, they will render a verdict for no more than that amount.' Breese, C. J., rendering the opinion, said: 'That is but telling the jury they must render a verdict for $5,000.' And can the same be said of this instruction? Certainly not. Here the jury are expressly told that the measure of recovery is the pe-

§ 990. **Duty of Coal Mine Operator to Keep Supply of Timber on Hand, to Secure Safety to Workmen—Words of Statute.** The court instructs the jury that the law makes it the duty of the owner, agent or operator of every coal mine to keep a supply of timber constantly on hand of sufficient lengths and dimensions to be used as props and cap-pieces, and to deliver the same as required with the miners' empty car, so that the workmen may at all times be able to secure said workings for their own safety, and if such operator fails—willfully so to do, and by reason of such failure a person employed about the mine is killed, the owner or operator is liable to the widow of the person killed for damages not to exceed the sum of $———.[36]

§ 991. **What Not to Be Considered—Punitive Damages Not to Be Given.** In this case, if you find for the plaintiff, you can only allow such damages as will make good the pecuniary loss sustained by the person for whose use this suit is brought. The mental sufferings, or grief of survivors, or loss of domestic or social happiness, or the degree of culpability of the defendant, are not proper elements in the calculation of damages. You can not award exemplary or vindictive damages; you must ascertain, from the evidence, the pecuniary loss sustained in dollars and cents, as nearly as you can approximate thereto, and make that good.[37]

cuniary loss sustained by the widow and next of kin by the death, but that recovery cannot exceed $5,000. There is no error in this instruction."

36—Mt. Olive Coal Co. v. Rademacher, 190 Ill. 538 (540), 60 N. E. 105.

"A similar instruction was held to be good in Catlet v. Young, 143 Ill. 74, 32 N. E. 447. It is expressed in the language of the statute itself, and for that reason is not erroneous. Where the instruction is given in the language of the statute, it must be regarded as sufficient, because laying down the law in the words of the law itself ought not to be pronounced an error. Town of Fox v. Town of Kendall, 97 Ill. 79; Chi. B. & Q. R. R. Co. v. Haggerty, 67 id. 113; Race v. Oldridge, 90 id. 250, 32 Am. Rep. 27; Duncan v. People, 134 Ill. 110, 24 N. E. 765."

37—Kansas Pacific Ry. Co. v. Cutter, 19 Kan. 83; Blake v. Midland, etc., Rd. Co., 18 Q. B. 93; Oakland & Co. v. Fielding, 48 Penn. 320; Donaldson v. Miss., etc., Co., 18 Ia. 280; Sutherland Damages, 3d ed., sec. 1263.

CHAPTER XLV.

DEEDS.

See Erroneous Instructions, same chapter head, Vol. III.

§ 992. Deed—Delivery of—Intention. (a) That the sole question for you to determine is did P—— deliver to S—— the deed from him to B——— conveying the land the subject-matter of this suit about the time he signed the same and did he intend to surrender all control over it and that the deed should be delivered by S—— to B——. If such is found to be the fact then your verdict should be for the plaintiff, if not, for the defendant.

(b) If you believe from the evidence that there was a trade between P—— and B——, in which B—— was to do certain things, and P—— was to make a deed for the lots in question, and if you further believe from the evidence that all the conditions in the trade on B——'s part were performed by him, then I leave it to you to say whether or not these facts show an intention by P—— to deliver said deed to B—— when he left it with S——.[1]

§ 993. Deed Obtained Without Grantor's Consent—Escrow. A deed which has been surreptitiously obtained from the grantor, without his knowledge or consent, does not, as a general rule, transfer title; but a deed made by a grantor and placed in escrow to be delivered to the grantee upon the proof of certain conditions, and which has been obtained from the party in whose possession it was placed, by untruthful statements, and afterward the condition upon which the deed was delivered was performed, and the grantor does not demand the possession of the deed, nor take any steps to recover the possession of the same, said deed will be effectual to convey title.[2]

1—Fitzpatrick v. Brigman, 133 Ala. 242, 31 So. 940 (941).

2—Chicago I. & E. Ry. Co. v. Linn, 30 Ind. App. 88, 65 N. E. 552 (553).

§ 994. **Acceptance of Deed—Bound by Terms in Deed.** If you find from the evidence that there was a deed made by plaintiffs to defendant, and the defendant accepted the same deed and had same recorded, and went into possession of the land mentioned in said deed, and constructed its road upon said land, it became bound by all the terms, provisions, and averments in said deed.[3]

§ 995. **Reservation of Water in Deed.** If the jury, under instructions from the court, shall find that the reservation in the deed from X to Y applied to the water supply claimed by the plaintiff, and if they shall find that defendant Z, without the consent of plaintiff, put in an aqueduct, and by means thereof diverted and took away the water, or any part of said water supply from said Y lot to other premises of said Z, then said Z violated the legal rights of the plaintiff, and it will be their duty to return a verdict in plaintiff's favor for at least nominal damages.[4]

§ 996. **Deed Referring to Plat for Fuller Description Incorporates Plat—Locating Land Covered by Deed.** Where a deed, after giving certain adjacent boundaries, refers to a plat attached to such deed for a fuller or better representation of the land, then this plat becomes incorporated into the deed as part thereof, and the one who claims title under such a deed is bound by the description of the land contained therein, and it cannot be changed or contradicted by parol evidence. The court instructs you that in locating land covered by a deed, the main questions are: What land does the deed cover? What land does the deed show the grantor conveyed?[5]

§ 997. **Intent—Constructive Notice of Matters in Deeds.** Upon the question of notice by K, you are instructed that whenever a mortgagee holds under a conveyance, and is obliged to make out his title through that deed, or through a series of prior deeds, he has constructive notice of every matter connected with or affecting the estate covered by the mortgage, which appears either by description of parties, by recital, by reference or otherwise, on the face of any deed which forms an essential link in the chain of instruments through which he must derive his title. The mortgagee, under this rule, is charged with notice of every provision in each separate in-

3—Silver S. O. & G. R. Co. v. VanNess et al., 45 Fla. 559, 34 So. 884 (889).

4—Peck v. Clark, 142 Mass. 436, 8 N. E. 335 (338).

"The instruction to the jury was correct. It may be true that, so long as the plaintiff had not appropriated the water, he could not have sued the defendant for doing transitory acts,—such as drawing water in pails, or watering his cattle; but when the defendant put in an aqueduct, which diverted the water continuously, and which would interfere with the exercise of the plaintiff's rights, whenever thereafter he sought to exercise them, he did an overt act of permanent effect, which amounted to a standing, open denial of the plaintiff's right, and which would have extinguished it in 20 years to the extent of the water withdrawn. Nominal damages may always be recovered for such an act."

5—Connor v. Johnson, 59 S. C. 115, 37 S. E. 240 (243).

strument constituting the entire series by which his own interest can be affected from which others have derived or may derive any right. Not only is he thus charged with a constructive notice of everything material in the deeds which form the direct chain through which his title is adduced, but, if any of these conveyances should contain a recital or reference to another deed or instrument otherwise collateral, and not a part of the direct series, he would, by means of such recital or reference, have notice of this collateral instrument, of its contents, and all the facts indicated by which it might be ascertained through inquiry prosecuted with reasonable diligence; and such notice extends to all deeds and other instruments falling properly within the preceding rules, whether recorded or unrecorded. The deed from H to W shows upon its face the conveyance of an expectancy in so far as the conveyance of his expectant interest in the estates of the mother and the brothers and sisters of plaintiff is concerned, and the defendant K was thereby put upon inquiry as to the adequacy of the consideration for the property conveyed by such deed; and, should you fail to find that such consideration was adequate, you will find for the plaintiff and against the defendant K, so far as his mortgage may affect such expectancy.[6]

§ 998. **Absolute Deed with Condition as to Reconveyance—Mistake.** If you believe from the evidence that it was intended by ——— and wife and ——— at the time of the execution of the deed of ———, that the title to the property in the controversy should vest in ——— by reason of said deed, but subject to be divested out of ——— by ——— and wife paying him a certain sum of money within a specified time, you will render your verdict in favor of plaintiff, for such a transaction would amount to a sale.[7] If you find from a preponderance of the testimony before you that the second of said two deeds was executed by defendant in an attempt to reconvey to ——— the property described in the first of said two deeds, and that the parties to said second deed, to wit, the defendant and ———, were at the time of the execution of said deed under the impression that the property therein described was the same property which had been conveyed to the defendant by the first of said two deeds, then plaintiffs are entitled to a verdict.[8]

§ 999. **Plaintiff's Deed by Way of Mortgage.** So far as regards this suit, it can make no difference whether the deed to the plaintiff was by way of mortgage to secure the payment of a sum of money or not. If it was so made, it was sufficient to vest the legal title to the premises in McK., and his deed to R. M. was sufficient to

6—Wells v. Houston, 23 Tex. Civ. App. 629, 57 S. W. 584; Feary v. O'Neill, 49 Mo. 467, 50 S. W. 918, 73 Am. St. Rep. 440.

7—Kruger v. Buttelman et al., — Tex. Civ. App. —, 56 S. W. 930.

8—Metcalfe v. Lowenstein, 35 Tex. Civ. App. 619, 81 S. W. 362 (364).

"The charge complained of undertook to submit the issue of mistake, and in this was correct."

vest the legal title to an undivided half of the premises in said M., and these two deeds are sufficient to enable the plaintiff to sustain this action, unless the jury find, from the evidence, under the instruction of the court, that the defendant had some right to the possession of the property other than such as he acquired by his alleged purchase from the said J. W. under the deed introduced in evidence by the defendant.[9]

§ 1000. **Lost Deed.** The jury is instructed if they believe from the evidence before them that on the ——— day of ———, plaintiff Susan T. signed the deed such as described in defendants' answer which had just before been signed by her husband, Allen T. conveying the land in controversy to defendant J. J. and that the plaintiff, Susan T., afterwards acknowledged the same before a notary public; that said deed and certificate of acknowledgment, if such document were acknowledged, have been lost or mislaid, then they could find for the defendants for the land in controversy.[10]

9—Biggen v. Bird, 55 Ga. 650.
10—Thompson et al. v. Johnson et al., 24 Tex. Civ. App. 246, 56 S. W. 1030.

CHAPTER XLVI.

DIVORCE.

See Erroneous Instructions, same chapter head, Vol. III.

DESERTION.

Note by Editor.— The subject of Divorce, being now wholly statutory, the statutes of the particular state and the decisions under them should always be consulted. For a compilation of the various grounds for divorce in all the states, see 2 Nelson on Divorce and Separation, p. 1025.

§ 1001. **Provocation for the Wife Leaving—Abusive Language.** That while the statute has not made abusive language, and the application of coarse and vulgar epithets, a cause for divorce, yet such conduct on the part of the husband toward his wife, and charging her with a want of chastity without cause, if proved, is sufficient to justify her in abandoning him, and in living separate and apart from him.[1]

§ 1002. **Separation by Mutual Consent—Desire for Reconciliation.** (a) The jury are instructed, that where a husband and wife, by mutual consent, agree to separate and live apart, and, pursuant to such agreement and consent they do live separate and apart from each other, this will not constitute such a desertion as is required under the statute as a ground for divorce.[2]

(b) Although the jury may believe, from the evidence, that at

1—Nelson on Divorce and Separation, § 95. Bishop on M. & D. §726.

2—Cox v. Cox, 35 Mich. 461; Beller v. Beller, 50 Mich. 49, 14 N. W. 696; 1 Nelson on D. & S., § 67; 1 Bishop on M. & D., § 783.

one time the parties to this suit separated, by mutual consent, still, if the jury further believe, from the evidence, that afterwards the complainant desired to renew her marriage relations with the defendant, and in good faith sought a reconciliation, and expressed a desire to have him return and live with her, and that he refused to accord to that request, then, from that time, defendant's absence, if proved, would constitute a desertion, and if continued for a period of two years, without justifiable cause, as explained in these instructions, would be good ground for a divorce in favor of complainant.[3]

(c) Although you may believe, from the evidence, that some time about, etc., defendant professed a desire to be reconciled to complainant, and requested her to return and live with him, still, if you further believe, from the evidence, that this request was coupled with the qualification or condition that, etc., such a qualification or condition was one that complainant was under no obligation to assent to, and such an offer, if proved, can not avail the defendant anything in this suit.[4]

§ 1003. Absence Alone Not Proof of Desertion. (a) The jury are instructed, that absence alone does not constitute desertion. To constitute desertion, within the meaning of the law, there must not only be absence, but this must be coupled with an intention, on the part of the party charged, to desert and permanently abandon the other party; and in this case, if the jury find from the evidence, that when the defendant left this state, he went away with the intention of providing another home for himself and wife, and of afterwards sending for her, or of returning and taking her with him to his new home, this would not amount to a desertion, although continued for more than two years.[5]

(b) And in such case, before the complainant will be entitled to a divorce on the ground of desertion, the jury must further believe, from the evidence, that after defendant left he changed his mind, and then determined not to come or send for complainant, but did intend, from that time, to desert and abandon her, and that such change or intention occurred two years or more before the commencement of this suit.[6]

§ 1004. Grounds of Desertion by Wife. The jury are instructed, that adultery on the part of the husband, if known to the wife (or extreme and repeated cruelty, or habitual drunkenness for the period of two years), if proved, is a good and sufficient cause to justify a wife in leaving her husband and living separate and apart from him.[7]

3—1 Nelson on D. & S., §§ 73-79; 1 Bishop on M. & D., § 786.

4—1 Nelson on D. & S., §§ 73-79. 1 Bishop on M. & D., 786.

5—Swan v. Swan, 15 Neb. 453, 19 N. W. 639; 1 Nelson on D. & S., § 65.

6—1 Nelson on D. & S., § 67; 1 Bishop on M. & D., § 783.

7—Stevens v. Story, 43 Vt. 327; Hancock v. Meirick, 10 Cush. 41; Rea v. Durkee, 25 Ill. 503; 1 Nelson on D. & S., § 95; Schouler's Dom. Rel. 90.

§ 1005. **Cruelty as an Excuse for Desertion.** (a) The court instructs the jury, as far as relates to the alleged acts of cruelty, that if they believe, from the evidence, that the defendant did leave the complainant, and remained away from him, as charged in the bill, then to justify such leaving and absence, upon the ground of cruel treatment, the jury must believe, from the evidence, that the complainant actually committed an act, or acts, of personal violence to the person of the defendant, prior to the time of the alleged desertion; and that abusive language, or violent sallies of passion, is not such violence as will justify desertion, if desertion has been proved; nor would threats of violence justify the alleged desertion, if it has been proved, unless they were made under such circumstances as would justify a reasonable apprehension of bodily injury in case she remained.[8]

(b) You are instructed, that such cruelty as would authorize a married woman to leave the house and home of her husband, must be acts of physical violence inflicted by him upon her person; or such demonstrations or threats of actual violence, made by him toward her, as would induce a well-grounded fear in a reasonable mind that such violent injuries would be inflicted upon her by her husband in case she remained.[9]

CRUELTY.

§ 1006. **Extreme and Repeated Cruelty as a Ground for Divorce.** (a) The court instructs the jury, that the extreme and repeated cruelty required to constitute a cause for a divorce, must be physical harm as contradistinguished from harsh or opprobrious language, or even mental suffering. The cruelty must be grave, and subject the person to great bodily harm.[10]

(b) A single act of cruelty does not constitute sufficient grounds for a divorce. There must be extreme and repeated cruelty, which must consist in physical violence, and not merely angry or abusive epithets or profane language; angry or abusive words, menaces or indignities do not constitute cruelty, within the meaning of the statute.[11]

§ 1007. **In Some States Personal Violence Not Necessary—Abusive Language.** (a) If the jury believe, from the evidence, that recently before the commencement of this suit the defendant was in the habit of using profane, obscene and insulting language towards the complainant in the presence of her mother and little children (or others) to such an extent as to render her life miserable, then this would constitute extreme cruelty for which our statute authorizes a divorce.[12]

8—1 Nelson on D. & S., § 95; Bishop on M. & D., § 795 et seq.

9—Carter v. Carter, 62 Ill. 439.

Note.—See chapter 48, on Domicil and Residence.

10—Henderson v. Henderson, 88 Ill. 248.

11—Embre v. Embre, 53 Ill. 394.

12—Goodman v. Goodman, 26 Mich. 417; McClung v. McClung, 40

(b) That to justify a verdict in favor of complainant actual physical violence need not be proved, provided the jury believe, from the evidence, that there is reasonable ground to believe that if the complainant is compelled to live and cohabit with the defendant as his wife her life or health will be endangered by his wrongful treatment of her.[13]

(c) If the jury believe, from the evidence, that the defendant was in the habit before and at the time of the commencement of this suit of using violent, coarse and abusive language to complainant and subjecting her to aggravating annoyances and humiliating insults to such an extent as to endanger her health or life, then this would be legal cruelty authorizing a verdict in her favor.[14]

§ 1008. Abusive Language Not Sufficient to Constitute Cruelty—Bodily Harm Necessary. The jury are instructed that the degree or kind of cruelty that authorizes a divorce is any wrongful conduct on the part of the defendant which tends to the bodily harm of complainant, or involves danger to her health or life. And although the jury may believe, from the evidence, that the defendant has been in the habit of using angry words and coarse, violent and abusive language towards the complainant, or of subjecting her to aggravating annoyances or humiliating insults, still, if the jury further believe, from the evidence, that these things merely tended to wound the feelings of the complainant, but were not accompanied by any bodily injury or threatened danger to life or health, they would not amount to legal cruelty.[15]

§ 1009. Acts of Cruelty Provoked by Complainant. (a) If the jury believe, from the evidence, that defendant has been guilty of acts of violence against the complainant, still, if they further believe, from the evidence, that such acts were provoked by complainant's misconduct, then the jury should not find the defendant guilty, by reason of such acts of violence; provided, such misconduct is proven to have existed, and to have been of such character as might be reasonably expected to provoke the acts charged against the husband.[16]

(b) The law will not permit a person, by her misconduct, to wantonly provoke injury, and make the injury thus received a

Mich. 493; Kennedy v. Kennedy, 73 N. Y. 369.

13—Black v. Black, 30 N. J. Eq. 215.

14—Latham v. Latham, 30 Gratt. (Va.) 307.

Note by Editor.—Cruelty without personal violence as a ground for divorce obtained in several states at an early period. In some states the doctrine was later overruled and in others a somewhat middle course has been adopted. Statutes have been passed on various grounds for divorce, and it now has become a question of statutory construction. For a full discussion on this subject see 1 Nelson on Div. and Sep., § 269 et seq.

15—Henderson v. Henderson, 88 Ill. 248; Latham v. Latham, 30 Gratt (Va.) 307. See previous section.

16—Skinner v. Skinner, 5 Wis. 449; Harper v. Harper, 29 Mo. 301; 1 Nelson on D. & S., § 326; 1 Bishop on M. & D., § 764.

ground for divorce, unless the injury is out of all reasonable proportion to the provocation. The law considers, in such cases, that the person complaining has the remedy for all ordinary injuries in his own hands, and that there is no occasion to resort to a court of equity.[17]

DRUNKENNESS—ADULTERY—CONDONATION.

§ 1010. **Habitual Drunkenness as Ground for Divorce.** If you believe, from the evidence, that the defendant, for a period of two years prior to the beginning of this suit, was frequently and customarily, or habitually given to the excessive use of intoxicating drink, and had, during said two years, or more, lost the power or the will, by the frequent indulgence, to control his appetite for it, then the defendant is guilty of habitual drunkenness.[18]

§ 1011. **Adultery as a Ground for Divorce—Must be Proved.** (a) The court instructs the jury, that on a charge of adultery, as a ground for divorce, a preponderance of evidence is sufficient to establish the charge. It is not required that the jury be satisfied of the truth of the charge beyond a reasonable doubt.[19]

(b) The jury are further instructed, that the law does not allow the jury to presume the adultery of the defendant, if the facts or circumstances relied upon to establish it may as well be attributed to an innocent intent or motive as to a guilty one.[20]

(c) Where adultery is charged, as a ground for divorce, the act charged is one that tends to degrade the parties, and inflicts great injury upon society, and if the facts shown by the evidence may as well be explained upon the hypothesis of innocence as of guilt, then you should always adopt the former rather than the latter hypothesis.[21]

(d) The jury are further instructed for the defendant that even though it appears from the evidence that the defendant and ———— were in a position where it was possible for them to commit adultery, still, in order to find for the complainant in this case on that issue, they must be seen together not only under circumstances which would make it possible for them to commit adultery, but also under circumstances which cannot be accounted for reasonably, under the evidence, unless they had that design.[22]

§ 1012. **Condonation—What Constitutes—Effect of.** (a) The court instructs the jury, that in the case of condonation, there is an express or implied agreement that the party forgiving does so only on

17—King v. King, 28 Ala. 315; 1 Nelson on D. & S., § 331, n 3; 1 Bishop on M. & D., §§ 764 et seq.

18—Richards v. Richards, 19 Ill. App. 465; Pratt v. Pratt, 34 Vt. 323; Com. v. Whitney, 5 Gray 85; Ludwick v. Com., 18 Penn. St. 174; Magahahy v. Magahahy, 35 Mich. 210; Murphy v. People, 90 Ill. 59; 1 Nelson on D. & S., § 350 et seq.

19—Chestnut v. Chestnut, 88 Ill. 548; 1 Nelson on D. & S., § 142.

20—Blake v. Blake, 70 Ill. 618.

21—Chestnut v. Chestnut, supra.

22—Pittman v. Pittman, 72 Ill. App. 500 (503).

the condition that the party forgiven will not repeat the offense, but will, in the future, perform all the marital duties the relation imposes.[23]

(b) That condonation is forgiveness upon condition that the injury shall not be repeated, and it is dependent upon future good usage and conjugal kindness; and it must be free, and not obtained by force and violence or by fraud.[24]

(c) You are further instructed, that condonation of personal acts of violence and cruelty may be avoided by abusive language, and the use of opprobrious epithets. A wife having forgiven her husband's acts of physical cruelty, may, from the subsequent use of abusive and brutal language, and charges of infidelity, conclude that it will end as on former occasions, in personal violence, and she is not bound to wait and submit to personal violence.[25]

(d) The court instructs you, that the law is, that if the injured party, husband or wife, cohabits with the other, subsequent to an adulterous offense, the party injured having the ability to prove the fact, it will be a bar to a proceeding for divorce for that offense, the offense being considered as thereby condoned; but the court further instructs you, that condonation is always accompanied with the implied condition that the injury shall not be repeated, and that the offending party will thereafter treat the other with conjugal kindness, or the offense will be revived.[26]

23—Kennedy v. Kennedy, 87 Ill. 250; Sharp v. Sharp, 116 Ill. 509, 6 N. E. 15.

24—1 Nelson on D. & S. §§ 451, 456; 2 Bishop on M. & D., § 33.

25—Farnham v. Farnham, 73 Ill. 497.

26—Davis v. Davis, 19 Ill. 334; 1 Nelson on D. & S., § 454, et seq.; 2 Bishop on M. & D., § 43.

CHAPTER XLVII.

DOMESTIC RELATIONS.

See Erroneous Instructions, same chapter head, Vol. III.

HUSBAND AND WIFE.

§ 1013. Wife Agent of Husband to Buy Necessaries. (a) You are instructed, as a matter of law, that if a husband neglects to provide his wife and family with articles of necessity suitable to his condition in life, the wife may procure them of others, and the husband will be liable to pay for them. The term, article of necessity, in this connection, includes whatever things are proper to be used in the family, and suitable to the manner of life which the husband authorizes or permits.[1]

(b) The jury are instructed, that where goods, necessary and suitable to the position in life of a wife living with her husband, are sold to her on the credit of her husband, and charged to him, a jury will be justified in finding that the wife was the agent of her husband to make the purchases; and, in this case, if the jury believe from the evidence, that the goods, for the price of which this suit is brought, were furnished to the defendant's wife while she was residing with him, and that they were necessary and suitable to the position in life

1—Clark v. Cox, 32 Mich. 204.

of the wife, then the defendant is liable to pay for the same; unless the jury further believe, from the evidence, that the defendant had forbidden the plaintiff to sell goods to his wife on credit.[2]

§ 1014. Wife Living Apart from the Husband without Her Fault. If the jury, believing from the evidence that the plaintiff sold the goods for which this suit is brought, to the defendant's wife while she was living separate and apart from him without his consent, still the defendant will be liable to pay for the same if the jury further believe, from the evidence, that the goods furnished were necessary and suitable and proper for the wife, regard being had to the condition in life of herself and husband, and that the wife had good and sufficient cause for living separate and apart from her husband, as explained in these instructions; and also that he had failed and refused to furnish her such necessaries or the money with which to purchase them.[3]

§ 1015. Wife Living Apart from Husband without Cause. The jury are instructed, as a matter of law, that if a wife deserts her husband without sufficient cause, as explained in these instructions, or remains separate from him without his consent, and without good and sufficient cause, he will not be liable for necessaries purchased by her.[4]

§ 1016. Wife Living Apart—What Necessary to Charge Husband. (a) If you believe, from the evidence, that the merchandise for which this action is brought was sold by plaintiff to defendant's wife, and that at that time she was living apart from her husband, and that the plaintiff was knowing to that fact, then to entitle the plaintiff to recover, the burden of proof is on the plaintiff to show, by a preponderance of evidence, that the wife was living apart from her husband, with his consent, or that the wife was justified in leaving her husband on account of his cruel treatment, or that his conduct was so violent as to lead her to reasonably fear personal violence, or on account of some other fault of the husband, which rendered it improper for her to live and cohabit with him.[5]

(b) You are further instructed, that if you believe, from the evidence, that the plaintiff sold the goods sued for, to the defendant's wife, while she was living separate and apart from her husband, without his consent, then to entitle the plaintiff to recover in this suit he must prove, by a preponderance of evidence, that the wife had just and legal reason to live separate from her husband, as explained in these instructions.[6]

2—Schouler's Dom. Rela. 77; 2 Page on Cont. sec. 834; 1 Pars. on Cont. 287.

3—Thorpe v. Shapleigh, 67 Me. 235.

4—Oinson v. Heritage, 45 Ind. 73; Bevier v. Galloway, 71 Ill. 517.

5—Rea v. Durkee, 25 Ill. 503; Bevier v. Galloway, 71 Ill. 517.

6—Rea v. Durkee, supra; Wilson v. Bishop, 10 Ill. App. 588.

PARENT AND CHILD.

§ 1017. **Parent Liable for Support of Minor Child.** (a) The court instructs the jury that the father of a minor child is chargeable for the support and maintenance of the child furnished at his request or with his consent.[7]

(b) The court instructs the jury, as a matter of law, that if a father permits his minor child to purchase goods on his account, and the father pays for them without objection, this will afford a presumption of agency with full power to make like purchases in the future.

(c) You are instructed that either an express promise, or circumstances from which a promise may be inferred, must be proved, by a preponderance of the evidence, before the father can be made liable for goods sold and delivered to his minor child.[8]

§ 1018. **Separation of Parents by Mutual Consent—Liability for Goods Furnished Child.** You are instructed that either an express promise, or circumstances from which a promise by the father may be inferred, is essential, in all cases, to bind him for necessaries furnished his infant child by a third person. Where the father and mother separate by mutual consent, and the father permits the mother to take the children with her, then the father constitutes the mother his agent to provide for his children, and he is bound by her contracts for necessaries furnished for them.[9]

§ 1019. **Emancipation of Minor.** (a) A father, by agreement with his minor child, may relinquish to the latter the right which he would otherwise have to his services, and may authorize those who employ him to pay him his wages, and he will then have no right to demand those wages, either from the employer or from the child.[10]

(b) You are instructed that while it is in general true that a father is entitled to the services and earnings of his son, until he arrives at the age of twenty-one years, still, the father may emancipate his minor son, and by agreement with him relinquish the right which he would otherwise have to the son's services and earnings. And this the father may do, although he is insolvent at the time.[11]

§ 1020. **Suit by Parent for Minor Child's Services—Payment to Minor.** If you believe, from the evidence, that A. B., the son of the plaintiff, made a contract upon his own account with the defendant, by which he agreed to work for the defendant from, etc., and defendant was to pay him, etc., and that the work for which this suit

7—Bradley v. Keen, 101 Ill. App. 519 (522).

8—Gotts v. Clark, 78 Ill. 229; Fowlkes v. Baker, 27 Tex. 135; Schouler's Domestic Rela., 5th ed., sec. 236 et seq.; Swain v. Tyler, 26 Vt. 9; Thayer v. White, 12 Met. 343.

9—McMillan v. Lee, 78 Ill. 443.

10—Monaghan v. School Dis., 38 Wis. 100.

11—Wambold v. Vick, 50 Wis. 456, 7 N. W. 438.

is brought was done by the said A. B. under said contract, and if the jury further believe, from the evidence, that such contract for services by the said A. B. was made with the knowledge and consent of the said plaintiff, or that the plaintiff knew of the existence of such contract while the work was progressing, and did not repudiate the contract or notify the defendant of his objection thereto, then the son was entitled to receive his own earnings, and a payment to the son would be a good payment.[12]

§ 1021. **Minor Can Only Disaffirm Contract After Majority**—*(By Statute).* By the laws of this state a minor is bound by his contracts unless he disaffirms them within a reasonable time after attaining his majority; disaffirmance before majority is of no effect. If a minor renders personal services under a contract, and accepts payment for them according to the contract, he cannot maintain an action by his next friend to recover again.[13]

MARRIED WOMEN.

Note.—The following instructions, relating to the rights and powers of women, are mostly adapted to the laws of those states where the common law disabilities of married women have been removed or greatly modified by statute. These laws vary greatly in the different states, and this fact must be borne in mind.

§ 1022. **Married Women—Contract of.** If the jury find that defendant made the contract alleged in the petition, then (she being a married woman) the jury should inquire whether she made such contract with reference to her separate property and business, or intended to bind her separate property for the payment thereof, and unless, from the evidence, the jury believed that the defendant made the contract of employment, and in making the same she made it with reference to her separate property and business, and intended to bind her separate property for the payment thereof, the defendant would not be liable.[14]

§ 1023. **She May Own, Manage or Convey.** Since the year 18— the husband does not, by marriage, acquire title to the money or property of the wife, but she retains all her rights of property, and may deal with the same as if she was unmarried. And money loaned by the wife to the husband since the statute of 18—, whether loaned before or after marriage, is a proper personal charge against him while living, and against his estate after his death.[15]

The fact that a crop is raised on the land of a wife, under the

12—Burdsall v. Waggoner, 4 Col. 261.

13—Murphy v. Johnson, 45 Ia. 57; Jones v. Jones, 46 Ia. 466; Lansing v. M. C. R. R. (1901), 126 Mich. 663, 86 N. W. 147, 86 Am. St. 567. See Hughes' Proc. 672, title Infants.

14—Russell v. Gunn, — Neb. —, 96 N. W. 341; Prentiss v. Paisley, 25 Fla. 927, 7 L. R. A. 640, and cases there cited.

15—Whitford v. Daggett, 84 Ill. 144; Vail et al. v. Mayer, 71 Ind. 159; Leach v. Rains, 149 Ind. 152, 48 N. E. 858.

supervision of her husband, he contributing some personal labor in controlling and managing the business, will not make the crop his, or subject it to the payment of his debts.[16]

§ 1024. **May Employ Husband as Agent.** (a) Under the laws of this state, a married woman owning either real or personal property, in her own right, may employ her husband as her agent to transact the business growing out of or relating to such property, without thereby subjecting the property to the payment of the husband's debts.[17]

(b) Although the jury may believe, from the evidence, that the plaintiff, in the management of her farm, availed herself of the services of her husband as her agent, and that he, from time to time, bestowed a portion of his time and labor in such management, still this alone would not subject the farm of the plaintiff, or the proceeds thereof, to the payment of the husband's debts.[18]

(c) The fact, if proved, that the husband uses and enjoys the separate property of his wife, and out of it procures the means to support his family, does not render such property liable for the debts of the husband.[19]

(d) The fact, if proved, that a married woman allows her husband to have a general use and control over her personal property, such use and control being of a character consistent with their common interests, and the proper enjoyment of it by both, will not make it liable for his debts, or entitle his administrator to claim the same.[20]

(e) A husband may act as the agent of his wife in the management and control of her personal property, either generally or specially, and if the property is in fact the property of the wife, then such control and management does not alter the title to the property or render it liable for the debts of the husband. And, in this case, if the jury believe, from the evidence, that the property was in fact the property of Mrs. G., then the fact, if proved, that the husband did control and manage it, will not make it liable for his debts.[21]

(f) When a married woman has money, or separate property in her own right, her husband may act as her agent for the control of her property or the investment of her funds. He may lease her property and collect the rents, or invest her money, or change the char-

16—Bongard v. Core, 82 Ill. 19; Montgomery v. Hickman, 62 Ind. 598; Hamilton v. Boothe, 55 Miss. 60.

17—Olsen v. Kern, 10 Ill. App. 578; Williams v. Paine, 169 U. S. 55.

18—Wells v. Smith, 54 Gar. 262; Farmers, etc., Bank v. Loftus, 133 Pa. St. 97, 19 Atl. 347, 7 L. R. A. 313.

19—Blood v. Barnes, 79 Ill. 437.

20—Primmer v. Clabaugh, 78 Ill. 94.

21—Brownwell v. Dixon, 37 Ill. 197; Rankin v. West, 25 Mich. 195; Wells v. Batts, 112 N. C. 283, 34 Am. St. Rep. 918.

acter of her investments, if authorized by her, without subjecting her property to the payment of his debts.[22]

§ 1025. May Ratify the Act of a Husband. In order that a married woman shall be bound by the acts of her husband in selling or exchanging her property, it is not necessary that she should expressly authorize him beforehand thus to act—she may ratify the act afterwards. And, in this case, if the jury believe, from the evidence, that the husband of plaintiff exchanged the mule in question with the defendant for a mare of the defendant's, either as his own property, or acting as the agent of the complainant, and that at or about the time of the trade, the complainant knew that her husband had so traded, and she did not, as soon as it could reasonably be done, repudiate the act of her husband, nor claim the property, then she must be deemed to have ratified the act of the husband in making the exchange, and she cannot now recover the property on the ground that she did not authorize the trade or did not know the law.[23]

§ 1026. When Proceeds of Her Farm Belong to Husband. (a) If a married woman places her money or property in the hands of her husband for the purpose of enabling him to carry on a general business, under such circumstances as to enable him to obtain credit on the faith of his being the owner of such money or property, and he does thereby obtain credit, then the entire capital so embarked in business, with the increase thereof, will be liable for the husband's debts.[24]

(b) When the husband, as the head of the family, occupies and cultivates the land of his wife, in his own name, then he is considered in law as occupying the farm, with her consent, for the common benefit of the family. And the proceeds of his toil upon such land are as much his property as though he had occupied the land as a tenant, and had rented from some other person.[25]

§ 1027. What Not Separate Estate as to Creditors of Husband. (a) The court instructs the jury, as a matter of law, that if the wife advance her own separate property or money, and place the same in the hands of her husband, for the purpose of enabling him to carry on any general trade or business, for his use and benefit, and the husband engages in such business, and, by his labor and skill, increases the property or funds while in his hands, then the entire capital embarked in the enterprise, together with the increase, will not con-

22—Wortman v. Price, 47 Ill. 22; Abbey v. Dego, 44 Barb. 374; Buckley v. Wells, 33 N. Y. 518; Welch v. Kline, 57 Penn. 428; Cooper v. Hare, 49 Ind. 394; Fuller v. Alden, 23 Wis. 301, 99 Am. Dec. 173; Dority v. Dority, 96 Tex. 211, 71 S. W. 950, 30 Tex. Civ. App. 216, 70 S. W. 338, 60 L. R. A. 941.

23—Lichtenberger v. Graham, 50 Ind. 288.

24—Patton v. Gates, 67 Ill. 164; Wilson v. Loomis, 55 Ill. 352.

25—Stennett v. Bradley, 35 N. W. 467.

stitute the separate estate of the wife, but they will be liable for the debts of the husband.[26]

(b) If the jury believe, from the evidence, that the property in question really belonged to the defendant in the execution, but was claimed and called the property of his wife, for the purpose of covering up said goods, and keeping them from the creditors of her husband, then the jury should find for the defendant.[27]

26—Robinson v. Breems, 90 Ill. 351.

27—Brownwell v. Dixon, 37 Ill. 197.

CHAPTER XLVIII.

DOMICIL AND RESIDENCE.

See Erroneous Instructions, same chapter head, Vol. III.

§ 1028. What Constitutes Residence or Domicil. (a) To constitute residence, there must be a fixed abode and an intention to remain at least for a time for business or other reasons, not solely connected with the bringing of a suit for divorce.[1]

(b) The court instructs you that, where a man has a settled and fixed abode, with an intention to remain there permanently for a time for business and other purposes, then in law such abode is his residence.[2]

(c) The court instructs you that, if you believe from the evidence that the defendant, B, at the time the attachment writ in this suit was sworn out and issued, was established in business in this state, and he personally lived and abided in this state with the intention of remaining in this state permanently as a resident, for business purposes, then in law he was a resident of this state, and your verdict on the attachment should be for the defendant.[3]

(d) The word "resided" as used in section 1703 of the Laws of the Territory of New Mexico compiled in 1897, and introduced in

1—Chapman v. Chapman, 129 Ill. 386 (390), 21 N. E. 806.

2—Barron v. Burke, 82 Ill. App. 116 (120).

The court said: "We think that this instruction properly states the law as to what constitutes a residence in this state under the attachment act. Board of Supervisors v. Davenport, 40 Ill. 197; Wells v. People, 44 Ill. 40; Wells v. Parrott, 43 Ill. App. 656. In the Davenport case, supra, Mr. Justice Breese, in considering the question as to what constituted a residence within the meaning of the revenue law, which provided for the taxation of property 'of persons residing in this State,' said: 'There must be a settled, fixed abode, an intention to remain permanently, at least for a time, for business or other purposes, to constitute a residence within the legal meaning of the term,' and held that, while the defendant's home or domicil was in New York, he had two residences, one in Illinois and one in New York. We think the same is true as to the attachment act. In determining what was a residence under the attachment act this court in the Parrott case, supra, used almost the identical language of Justice Breese above quoted."

3—Barron v. Burke, supra.

evidence before us, is synonymous with and means the same as the word "domiciled," and, under said article to entitle a citizen of the United States to vote at an election held in New Mexico he must, at the time the election is held, have his domicil in said territory.[4]

§ 1029. **Must be the Act of Removal with Intention of Remaining to Constitute Change of Domicil.** The court instructs the jury, that to constitute a change of domicil, there must be the act of removal combined with the intention of remaining. If the jury believe, from the evidence, that J. L., the husband of the defendant, some time and about, removed from this state to——, with the intention of taking up his permanent residence there and without the intention of returning to this state as a place of residence, and that he never did return to this state, then the domicil of the said J. L., at the time of his death, was not in this state.[5]

§ 1030. **Residence—Husband the Right to Select—Desertion.** (a) The jury are instructed, that in law the domicil of the husband is that of the wife, and her residence follows that of the husband. When a husband acquires a new home, it is the duty of the wife to go with him, and if she refuses, without justification, for two years, the husband will be entitled to a divorce.[6]

(b) That the husband has the right to select his domicil, and to change his residence, and it is the duty of the wife to accompany him, and if she refuses without some good and justifiable cause, as explained in these instructions, he will not be guilty of deserting his wife by selecting and going to a new home and leaving her behind.[7]

§ 1031. **Domicil of Husband that of Wife—Domicil of Widow.** (a) The jury are instructed that the domicil of the husband is that of the wife so long as they live together as husband and wife, and the domicil of the widow continues to be that of her late husband until she changes it of her own volition, and if she does change her domicil of her own motion and volition by taking up her permanent residence elsewhere, then the presumption that her domicil is that of her late husband ceases.[8]

(b) The jury are instructed, as a matter of law, that the domicil of the husband upon marriage at once becomes the domicil of the wife, and the domicil of the wife continues to be the same as that of the husband so long as they remain together as husband and wife.[9]

4—Laferiere v. Richards, 28 Tex. Civ. App. 63, 67 S. W. 125 (126).

"The first part of the charge criticised was properly given in order to give the jury a correct understanding of the term 'resident' as used in such statute, and to our minds the subsequent part of the clause does nothing more."

5—Hayes v. Hayes, 74 Ill. 312.

6—Kennedy v. Kennedy, 87 Ill. 250; Hunt v. Hunt, 29 N. J. Eq. 96.

Note—See chapter 46, on Divorce.

7—Babbit v. Babbit, 69 Ill. 277; Ashbaugh v. Ashbaugh, 17 Ill. 476; 1 Nelson on D. & S. sec. 68; Bishop on M. & D. sec. 788.

8—Kennedy v. Kennedy, 87 Ill. 250; Smith v. Smith, 28 N. W. 296.

9—Bouvier's Law Dic.; Webster's Dic.; Board of Sups. v. Davenport, 40 Ill. 197; Hascall v. Hafford, 107 Tenn. 355, 65 S. W. 423, 89 Am. St. 952.

§ 1032. **When a Person is Not a Resident of the State.** (a) If the jury believe, from the evidence, that the defendant, N., has not maintained a residence in the State of Illinois previous, and did not reside in this state at the issuing of the attachment in this case, according to the legal interpretation of the word, as laid down in these instructions; that he had no fixed place of abode or habitation; that he never kept house in M—; that he spent only a portion of his time in Illinois; that his family was divided, unsettled and constantly moving about, part of the time in Illinois and part of the time at some place or places in some of the eastern states, then the defendant was not a resident of the State of Illinois in the true intent and meaning of the statute, and they will find for the plaintiff.[10]

(b) The jury are instructed that residence necessarily involves the idea of a local habitation or place of abode, and if the jury believe at the time of the issue of the attachment writ, the defendant had no local habitation or place of abode within the State of Illinois, and that he was actually residing without the said State permanently—at least for an indefinite time—they should find the issues upon the attachment in favor of the plaintiff.[11]

§ 1033. **Pauper—Acquiring Legal Residence.** (a) If, during entire period of her four years' residence in F, C. was supported by herself or by other persons without aid or assistance from Fairfield, then she had, within the meaning of the law, maintained herself there without becoming chargeable to the town.

(b) It is claimed in argument that at the time she went to F. her home was in R., and that her stay in F. was only a temporary one. That is a question for the jury to decide from the evidence in the case. If the jury find that she was an inhabitant of either R. or D. before she went to F., and that she continuously resided and had her home in F., and nowhere else for four years, and that she maintained herself there during that time in the sense above explained, then she gained a legal settlement in F.

(c) If when she went to F. she did not have capacity to form or retain an intention as to her place of residence, or to make choice of such place, this fact of itself would not prevent her from gaining a legal settlement in that town.[12]

10—Pullian v. Nelson, 28 Ill. 112.

11—Witbeck v. Marshall-Wells Hardware Co., 188 Ill. 154 (156), aff'g 88 Ill. App. 101, 58 N. E. 929.

"There was sufficient evidence upon which to base this instruction, and we find no error in it."

12—Town of Ridgefield v. Town of Fairfield, 73 Conn. 47, 46 Atl. 245 (246).

CHAPTER XLIX.

EJECTMENT.

See Erroneous Instructions, same chapter head, Vol. III.

§ 1034. Only Legal Titles Involved *(Where Common Law Rule Prevails).* The court instructs the jury, that in an action of ejectment it is only the legal rights of the parties, as distinguished from their equitable rights, that the jury have a right to consider. In this case, if the plaintiff shows a legal title to the premises in controversy, as explained in the following instructions, then no equitable right in the defendant will bar the plaintiff's right of recovery.[1]

§ 1035. Source of Title—Starting Point—Title Deduced from a Common Source. (a) The jury are instructed, as matter of law, if you believe from the evidence that the land in question in this case is a portion of the south fractional half of Section 29, etc., that the source of title to such land is in the State of Illinois, and that in proving title to the land in question it is not necessary for the plaintiff to commence with the United States, or to go further back than the State of Illinois as a starting point in making out its chain of title to said land.[2]

(b) The court instructs the jury, as a matter of law, that where both parties, in an action of ejectment, claim to derive title through

1—Newell on Eject. 360, 361, 564; Sims v. Gray, 66 Mo. 613; Dawson v. Hayden, 67 Ill. 52; Buell v. Irwin, 24 Mich. 145; Whyte v. Smith, 4 Sawyer (Oreg.) 17; Phillpotts v. Blasdell, 8 Nev. 61; Kelley v. Hendricks, 57 Ala. 193; Cahill v. Cahill, 75 Conn. 522, 60 L. R. A. 706.

2—C. & A. R. R. Co. v. Keegan, 185 Ill. 70 (78), 56 N. E. 1088.

Note—See chapters on Adverse Possession and Limitations, Statute of.

or under the same person, then neither party is bound to show title back of that person, and the one having the better title or right from that common source has the better title for all the purposes of the suit.[3]

§ 1036. **Title in Third Party—Defect in Defendant's Title.** (a) The jury are instructed by the court that the defendant can set up any outstanding title in another as a complete defense, and if you believe from the evidence that plaintiff sold and conveyed the land in dispute to another prior to the commencement of the suit, and the title thereto was in another at that time, you should find for the defendants.[4]

(b) The court instructs the jury that the plaintiffs' right to recover depends upon the strength of their title, not upon the weakness of the defendant's title, or the exhibition of defects in the defendant's title, and that the defendant may maintain his defense by the failure of the plaintiffs to show that a better title is in them than is in the defendant, or by the defendant showing the title is not in the plaintiffs, but in some one else.[5]

§ 1037. **Plaintiff Must Show Better Title Than Defendant to Recover.** The court charges the jury that if, upon the evidence before them, and the charge of the court, they are unable to say that plaintiff had shown a better title than defendant has shown by his evidence, then the plaintiff is not entitled to recover.[6]

§ 1038. **Possession Prima Facie Evidence of Title—Plaintiff Must Show Good Title to Recover.** (a) The court instructs the jury, that in an action of ejectment, prior peaceable possession by the plaintiff claiming to be the owner in fee, if proved, is *prima facie* evidence of ownership and seizin, and sufficient to authorize a recovery unless the defendant shall show a better title.[7]

(b) The court instructs the jury that the possession of land by a party claiming it as his own in fee is *prima facie* evidence of his ownership and seizin of the land, and that it is incumbent upon the plaintiffs in an action of ejectment to prove and show in them a good, perfect, and sufficient title to the land to enable them to recover from the defendant.[8]

§ 1039. **Ownership Presumed From Actual Peaceable Possession—Rebuttable.** (a) A person in the actual peaceable possession of real estate is presumed to be the owner of the fee, until the presumption is rebutted, and he is not required to show in what manner, or by what title, he holds, until the plaintiff shows a better title.[9]

3—Miller v. Hardin, 64 Mo. 545; Spect v. Gregg, 55 Cal. 198; Morrison v. Wilkersen, 27 Ia. 374; Cronin v. Gore, 38 Mich. 381; Whisenhunt v. Jones, 78 N. C. 361.

4—Ellis v. Clark et al., 39 Fla. 714, 23 So. 410 (411).

5—Atkinson v. Smith et al., — Va. —, 24 S. E. 901 (902).

6—Anniston City Land Co. v. Edmondson, 127 Ala. 445, 30 So. 61 (65).

7—Sherwood v. St. Paul, etc., Rd. Co., 21 Minn. 127; Barger v. Hoobs, 67 Ill. 592; Davis v. Thompson, 56 Mo. 39.

8—Atkinson v. Smith, — Va. —, 24 S. E. 901 (902).

9—Doty v. Burdick, 83 Ill. 473, Sears v. Taylor, 4 Col. 38.

(b) That while it is true that, to entitle the plaintiff in ejectment to recover, he must not only show title in himself, but he must also show that he was entitled to the possession of the premises at the commencement of the suit. Still, the law is, that the one who shows the better legal title to real estate is always presumed to be entitled to the possession of the property, unless the other party shows some valid legal right to the possession of the property, as against the true owner.[10]

§ 1040. **Right to Possession Must be Shown—First Possessor Has the Better Title.** (a) The jury are instructed, that to entitle the plaintiff to recover in this case, it is not sufficient for him to show that he holds the legal title to the premises in controversy; it must further appear, from a preponderance of the evidence, that at the time of the commencement of this suit, the plaintiff was then entitled to the possession of the premises.[11]

(b) When both parties, in an action of ejectment, claim title to the premises by showing simply possession at different times, under claim of ownership, then the first person is deemed to have the better title, unless he delays for an unreasonable length of time to assert his right to the property.[12]

§ 1041. **Two Parties in Constructive Possession—Oldest Possession and Best Title Prevails.** The court instructs you that when two parties are both in constructive possession of land, he who has the oldest possession and the best title must prevail.[13]

§ 1042. **Occupancy—Constructive Possession—Extended to Land Described in Deed—Exception.** The court instructs the jury that where a party comes into possession under a conveyance, although that conveyance may be void, and takes possession of a part of the land claiming it all, that possession is extended to the whole of the land so described in the deed, except such part as may be in the adverse possession of somebody else.[14]

§ 1043. **Bona Fide Settler—Abandonment.** If you do not find that A was an actual bona fide settler on said land on the —— day of ————, and that his abandonment, if any, was temporary, and caused by a well-grounded fear of death or serious bodily injury, you will return a verdict for defendant upon the whole case.[15]

10—Thompson v. Burhans, 15 Hun (N. Y.) 581.

11—Kilgour v. Gockley, 83 Ill. 109; Gustin v. Barnham, 34 Mich. 511; Lotz v. Briggs, 50 Ind. 346; Williams v. Murphy, 21 Minn. 534; San Felipe, etc., v. Belshaw, 49 Cal. 655.

12—Martin v. Bonsack, 61 Mo. 556; Clark v. Clark, 51 Ala. 498; Lum v. Reed, 53 Miss. 73; Jones v. Easley, 52 Ga. 454; Southmayo v. Henley, 45 Cal. 101.

13—Connor v. Johnson, 59 S. C. 115, 37 S. E. 240 (245).

14—Chastang v. Chastang, 141 Ala. 451, 37 So. 799 (800).

See chapter on Adverse Possession for other instructions on this subject.

15—Jones v. Wright, — Tex. Civ. App. —, 81 S. W. 569 (570).

"This charge would naturally be understood and read as follows: 'If you do not find that said A was an actual bona fide settler on

§ 1044. **Deeds to Third Party as Evidence.** (a) The court charges the jury that the deed of B. to the W. Company, in evidence before you, is no evidence that B. or any one else had any right, title, or interest in the lands in dispute in this suit.

(b) The court charges you that the paper writings or written instruments executed by F. to W., introduced by the plaintiff, and in evidence before you, are no evidence that said C. or F. or any one else, had any right, title or interest to convey in the lands in controversy in this suit.

(c) The court charges you that the deed of W. and wife to J., introduced in evidence by the plaintiff, is no evidence that W. and wife, or either of them, or any one else had any title or interest in the lands in controversy.

(d) The court charges you that the deed of E. to W. in evidence before you, is no evidence that said E. or any one else, had any title, right, or interest in the lands sued for in this action.[16]

§ 1045. **Title Conveyed Before Suit—Right to Sue.** (a) The court charges the jury that if they believe from the evidence that B. had conveyed away his whole title to the land in controversy before this action was brought, that plaintiff is not entitled to recover on the alleged demise of B.

(b) The court charges the jury that if they find from the evidence that the O. Company had conveyed away its whole title to the land in controversy before this action was brought, plaintiff cannot recover on the alleged demise of the O. Company.

(c) The court charges the jury that if they find from the evidence, under the charge of the court, that the W. Company had conveyed away its whole title to the land in controversy before this action was brought, that plaintiff is not entitled to recover on the alleged demise of W. Company.[17]

said land on the —— day of ——, and (if you do not find) that his abandonment, if any,' etc. It is manifest that by the latter portion of the charge it was intended that the jury should consider the issue of abandonment in case they found affirmatively in reference to the first portion."

16—Anniston City Land Co. v. Edmondson, 127 Ala. 445, 30 So. 61 (65).

"Above charges assert the principle, that the several deeds introduced in evidence are not evidence that the several grantors had any interest or title in the land in dispute. While the deeds in themselves are evidence of a conveyance of whatever right, title, or interest the grantors may have had in the land, they cannot as against the defendant, who is a stranger to the deed, be considered as showing that the grantor had any right, title, or interest in the land. The giving of these charges at the request of the defendant was free from error. Malone v. Arends, 116 Ala. 19, 22 So. 500."

17—Anniston City Land Co. v. Edmondson, 127 Ala. 445, 30 So. 61 (65).

"The court may, at the written request of either party, charge upon the effect of the evidence where it is free from conflict or adverse inference."

CHAPTER L.

FORCIBLE ENTRY AND DETAINER.

See Erroneous Instructions, same chapter head, Vol. III.

§ 1046. Title Not Involved—The Real Question in Issue. (a) The court instructs the jury, that in this action the title to the property in question is not involved; the material questions in the case for the jury to determine are the right to the possession of the premises.[1]

(b) That although you may believe, from the evidence, that the defendant was the legal owner of the premises in question, and was lawfully entitled to the possession thereof, still, if you further believe, from the evidence, that plaintiff was in the actual, exclusive and peaceable possession of the premises, the defendant would have no right to forcibly enter and expel the plaintiff therefrom.[2]

(c) The jury are instructed that whether the plaintiff was lawfully or unlawfully in the possession of the premises, is a matter of no consequence in this suit. The material questions for the jury to determine by the evidence, are whether, in fact, at the time in question, the plaintiff was in the actual, peaceable possession of the premises in question, and whether the defendant entered upon such possession against the will of the plaintiff, and retains such possession; and if the jury find both these points in favor of the plaintiff (and that he served a written demand for such possession upon the defendant before the commencement of this suit), then the jury should find the defendant guilty.[3]

§ 1047. Entry without Force, but Against Consent and Will of Plaintiff. If you believe, from the evidence, that the plaintiff was in the peaceable possession of the premises sued for, and that while

1—Myers v. Koening, 5 Neb. 419; Evill v. Conwell (1828), 2 Blackf. (Ind.) 133, 18 Am. Dec. 138 (148).
2—Cooley on Torts 323; Dilworth v. Fee, 52 Mo. 130; Huftalin v. Misner, 70 Ill. 205.
3—Allen v. Tobias, 77 Ill. 169; Jones v. Shay, 50 Cal. 508.

he was so in possession, the defendant, at the time alleged, entered upon such possession, without the consent and against the will of the plaintiff, and still holds such possession; and if you further believe, from the evidence, that before the commencement of this suit, the plaintiff made a written demand upon the defendant for the possession of said premises (or following the requirements of the statute), then you should find a verdict for the plaintiff.[4]

§ 1048. **Entry by Force or Threats Essential.** The jury are instructed that to authorize a verdict against the defendant, the jury must believe from the evidence that the plaintiff was in the actual possession of the premises prior to the alleged forcible entry or detention, and that the defendant took the possession with force and violence, or by such a show of force and threats as was reasonably calculated to intimidate the plaintiff, or else that the defendant kept such possession unlawfully and by force and violence, or by threatening the same.[5]

§ 1049. **Obtaining Possession by Stealth or Stratagem.** The law is that if a person obtains an entry upon the possession of another by stealth or stratagem, or in any other way without actual force or violence, and the jury believe, from the evidence, that such entry was for the purpose and with the intention of forcibly expelling the person in possession, and the entry is followed up by an actual expulsion of such person by means of personal threats or violence or superior force, it will amount to forcible entry.[6]

§ 1050. **Forcible Entry and Forcible Detainer Are Distinct.** The offenses of forcible entry and forcible detainer are entirely distinct. Every forcible entry is forbidden by law, and is, therefore, unlawful, whether the person taking such forcible possession is legally entitled to the possession or not. But every forcible detainer is not forbidden by law; if a person gains peaceable possession and he is then legally entitled to possession, he may hold such possession by force.[7]

§ 1051. **What Amounts to Forcible Entry.** (a) You are instructed that if you believe, from the evidence, that some time on and about, etc., the premises in question were vacant and unoccupied, and that the plaintiff then made a peaceable entry into said premises under a bona fide claim of right, and inclosed the same (with a wire fence), then this was an actual possession by him. And if you further believe, from the evidence, that after the plaintiff had so taken possession, the defendant, in plaintiff's absence, took possession of said premises and forcibly tore down the said fence and refused to surrender possession to the plaintiff upon his demand, this would amount

4—Croff v. Ballinger, 18 Ill. 200; McCartney v. Auer, 50 Mo. 395.

5—Archey v. Knight, 61 Ind. 311.

6—Seitz v. Miles, 16 Mich. 456; People v. Smith, 24 Barb. (S. C.) 16.

7—Hoffman v. Harrington, 22 Mich. 52; Evill v. Conwell, 2 Blackf. (Ind.) 133, 18 Am. Dec. 138.

to a forcible entry and detainer and you should find the defendant guilty.[8]

(b) While it is the law that the mere cutting of a few brush or the attempt to plow the land in controversy would not, of itself constitute possession, nor would the attempt to enter upon the prior actual possession of defendant (if he ever had such possession) furnish any grounds for this action, you are instructed that it is also the law that if the plaintiff, under an arrangement with C. entered into the peaceable possession of the ground in controversy in ——, with the right to occupy and use the same, and you find such to be the fact from the evidence before you; and you also find from such evidence that at such time the said ground was open, vacant, and had been abandoned, and that after C. obtained peaceable possession of said land he built and repaired fences so as to completely inclose the same; and if you find that brush was cut in ——, by C., wires removed, and the fence maintained until April, ——, and that during said month, while the fence inclosed said land, he commenced plowing said land, and while the plow was in the furrow the defendant, G. entered upon said land, securing the plow, and preventing by threats of personal violence the completion of said plowing by R. for C.,—such entry upon the part of G. would be unlawful and forcible, and it would be your duty to so decide by your verdict.[9]

§ 1052. **What Constitutes Possession.** (a) The jury are instructed, that it is not necessary, in order to establish possession of real estate, that the claimant should actually reside upon it or have it inclosed with a fence. It is enough if the party is doing such acts thereon as indicate in an open, public, visible manner, that he is exercising exclusive control over the land under a claim of right to such exclusive possession.[10]

(b) The court instructs you, as a matter of law, that in order to constitute possession of real estate, it is not necessary that the lands shall be resided upon or surrounded by a fence. Any act that will equally well evince an intention to assert and claim possession, such as raising crops, cutting grass, or herding cattle thereon, provided such herding is open and exclusive—will constitute such a possession as will enable the party to maintain an action of forcible entry and detainer against any person who, without the consent of the party so in possession, enters upon such possession and wrongfully and forcibly holds the same.[11]

§ 1053. **What Does Not Constitute Possession.** If you believe, from the evidence, that shortly before the alleged entry upon said

8—Campbell v. Coonradt, 22 Kans. 704.

9—Galligher v. Connell, 35 Neb. 517, 53 N. W. 383.

10—Pearson v. Herr, 53 Ill. 145; Hughes' Proc. secs. 326-333.

11—Goodrich v. Van Landingham, 46 Cal. 601; Bradley v. West, 60 Mo. 59; Pensoneau v. Bertke 82 Ill. 161.

premises by the defendant, and before any entry thereon by the plaintiff, the defendant had been in possession of the said house, and that when he left he locked the doors, taking with him the key to the outside door, and that he retained possession of said key; and if you further believe, from the evidence, that some time about the, etc., and while the defendant had said key in his possession, or under his control, the plaintiff effected an entrance to said house through one of the windows, without the knowledge or consent of the defendant, then a possession thus acquired by the plaintiff is not sufficient to sustain this action.[12]

12—2 Cooley on Torts, 3d ed., 661; Steinlein v. Halstead, 42 Wis. 422; Wray v. Taylor, 56 Ala. 188.

CHAPTER LI.

FRAUD AGAINST CREDITORS.

See Erroneous Instructions, same chapter head, Vol. III.

§ 1054. Fraud Not Presumed—Burden of Proof. (a) Fraud is never presumed, but must be proved. The law presumes that every person transacts business honestly and in good faith, and the burden of proving fraud is on the party who charges fraud. In this case the burden of proving fraud is on the defendant.[1]

(b) The court instructs the jury that fraud can not be presumed, but must be proved.

(c) That fraud is never to be imputed where the transaction may be fairly reconciled with honesty, and if the weight of evidence is in favor of that conclusion, it should always be adopted.[2]

(d) If the proof fails to establish any of these material facts by a clear preponderance of the evidence then the plaintiff cannot recover.[3]

1—Crockett v. Miller, 2 Neb. 292 (unof.), 96 N. W. 491 (493).

2—Mathews v. Reinhardt, 149 Ill. 635 (642), 37 N. E. 85.

"The first of these instructions is objected to. That it announces a correct proposition of law as applied to this case, can not be doubted. It may be admitted that there are cases where the law will raise a prima facie presumption of fraud, so as to throw upon the party implicated, the burden of exculpating himself, as in case of dealings by a guardian with his ward, or by an attorney with his client, and in other cases of dealings between parties holding fiduciary relations to each other, but no such presumption arises in this case. Here no such relations between the parties exist, and their transactions must be held, prima facie, to be fair and honest, and consequently, before fraud can be held to exist, it must be proved.

"Nor do we think the instruction obnoxious to the objection made to it, viz., that it must have been understood by the jury as holding that fraud must be proved by direct evidence and not by circumstances. There is certainly nothing in the language used warranting or even suggesting that view. It simply holds that fraud must be proved, but does not attempt to deal in the least with the question of the mode of proof. And when read in connection with the second instruction which immediately follows it, and in fact forms with it one continuous proposition, it is clear that there was no possible danger that the jury were misled in the way supposed."

3—Klipstein v. Raschein, 117 Wis. 248, 94 N. W. 63 (64).

"It should not be overlooked that a somewhat greater degree of certainty as to the existence of facts required to make out the plaintiff's case is necessary where the defendant is charged with fraud, and especially where the charge is such as, if true, would indicate that he committed a criminal offense of some character, such as that of obtaining money under false pretenses. The rule laid down in Poertner v. Poertner, 66 Wis. 644, 29 N. W. 386, is that the facts constituting culpable liability should be made out by the 'clear and satisfactory preponderance of the evidence.' It will be observed that the language complained of is so near that used by this court in that case as to suggest that the learned circuit judge, in giving the instructions complained of here, had the same in mind. It is commonly said in cases of this kind, that the plaintiff is required to establish his cause of action by clear and satisfactory evidence. Blaeser v. Milwaukee M. M. Ins. Co., 37 Wis. 31, 19 Am. Rep. 747; F. Doh-

§ 1055. **Fraud Not to be Presumed From Borrowing Money or Giving Security.** There is nothing unlawful nor improper for one person to advance or loan to another money, simply because the other is in financial difficulty. Ordinarily, that is the only time that one wants financial assistance. Neither is it unlawful to require and receive security therefor. What the law condemns, and under which it affords no protection to a person loaning money or purchasing property, is that the loan or purchase be coupled with the intent to defraud, hinder and delay the creditors of the party obtaining such loan or making such sale. Hence, if you shall find the allegations of the petition to be sustained, as required by these instructions, the plaintiff would be entitled to recover, unless the allegations of the defendant's answer are by you found from the evidence to be sustained by a preponderance of the evidence. If you shall find from the evidence, by a preponderance thereof, that plaintiff had possession of the goods in question as trustee for the benefit of creditors, then the defendant would be entitled to a verdict, except as to any surplus that such goods have been shown by the evidence to have been worth over and above the amount of the attachments held by the defendant, and under which he justifies the taking of the goods. And that brings our examination to the other defense, alleging a conspiracy of plaintiff and others to defraud the creditors of ————, and upon this point I read you the instructions asked by the respective parties to this action.[4]

§ 1056. **Fraudulent Conveyance—Mere Suspicions Not Sufficient—Sale by One Indebted—Knowledge of Purchaser.** (a) Though a sale of property be fraudulent on the part of the vendor, and be made to defraud his creditors, the purchaser cannot be affected by the fraud, unless he participated in it with a knowledge of the fraudulent design, or with such knowledge as would put the ordinarily prudent man upon inquiry, and further the accomplishment of such design.

(b) The fact that a person selling his goods is at the time

men Co. v. Niagara F. Ins. Co., 96 Wis. 38, 52, 71 N. W. 69. That is in accordance with the rule laid down in the text books. Jones, Ev. sec. 190. It justifies the charge complained of. We can see no substantial difference between establishing a cause of action or the facts constituting a cause of action or defense by a clear preponderance of the evidence and establishing the same clearly and satisfactorily. In the very nature of things no fact can be established to a reasonable certainty, the certainty required in any civil action, by less than the preponderance of the evidence, nor established with such certainty, clearly, by less than a clear preponderance of the evidence, the clear weight of evidence. The phrase usually employed in instructing juries, and the one that has been most frequently applied, and which in our judgment is the better way of stating the rule, is that the facts constituting the fraud must be established by clear and satisfactory evidence. We are inclined to favor that form of expression, though it means substantially the same as the one used by the trial court."

4—Barton v. McKay, 36 Neb. 632, 54 N. W. 968 (971).

indebted, and does not intend to apply the money he receives for them to the debts, is not of itself sufficient to establish a fraudulent or dishonest purpose. The sale to be void as to creditors must be made with the intent to hinder, delay, or defraud them, in which the purchaser must participate by purchasing with a view to abet the fraudulent design. Fraud must be proved. Mere suspicions leading to no certain result are not sufficient grounds to establish it. It is incumbent upon a party who attacks a conveyance on the ground of fraud that it was made to defraud creditors, to show that if it had not been made the goods would have been liable to seizure and sale upon execution.[5]

§ 1057. Sale With Intent to Defraud Creditors. (a) The jury are instructed, that every sale or conveyance of property, made by the parties with intent to hinder, delay or defraud creditors in the collection of their debts, is fraudulent and void as to such creditors, whether such sale or assignment is made with or without a valuable consideration therefor.[6]

(b) The law presumes that every man intends the necessary consequences of his acts, and where the conduct of the debtor necessarily results in defrauding his creditors, he is presumed to have foreseen and intended such result.[7]

§ 1058. Specific Intent to Defraud Subsequent Creditors. The jury are instructed that, in order to find a verdict for the defendant, O., in this case, it is necessary to find from all the evidence that at the time when the property in question was transferred from C. H. to M. A., this plaintiff, that there was an express design and specific intent to defraud the subsequent creditor who obtained the judgment against C. H. which has been shown in this case or subsequent creditors generally.[8]

§ 1059. Must Show Fraudulent Intent of Assignor and Knowledge of Assignee—Burden of Proof. The party who asserts that the title did not pass by assignment, as against him, must make such proof as will establish that proposition. If he does not, the presumption which the law indulges is that the vendee or assignee rightfully acquired possession of the property. It devolves on him

5—Purcell W. G. Co. v. Bryant, — Ind. Ter. —, 89 S. W. 662.

6—Campbell v. Whitson, 68 Ill. 240; Stillings v. Turner, 153 Mass. 534, 27 N. E. 671; Fluegel v. Henschel, 7 N. D. 276, 74 N. W. 996, 66 Am. St. 642.

Note.—In many of the states, the retaining of the possession of personal property, by the vendor, after an absolute sale, is held, in favor of the creditors of the vendor, to be prima facie or presumptive evidence of a fraudulent intent on the part of the vendor, known to and participated in by the vendee; but such presumption may be rebutted by evidence of good faith. In some of the states such retaining of possession is held to be conclusive evidence of fraud, in favor of the creditors of the vendor, and not subject to explanation. In other states the matter is regulated by statute.

7—Williams, Constable et al. v. White, 7 Kan. 664, 53 Pac. 890 (891).

8—Aldous v. Olverson, 17 S. D. 190, 95 N. W. 917 (920).

who attacks the assignment to show, not merely the fraudulent intent on the part of the assignor, but also the knowledge of and participation of such fraud by the person to whom, or in whose favor, such assignment is made, in order to seize in his hands the goods so assigned.[9]

§ 1060. **Good Faith as to Creditors—Intent—Knowledge of Grantees—Putting Prudent Man on Inquiry—Insolvency.** (a) The court instructs the jury that the law requires the debtor to act in good faith with his creditors, and apply his property not exempt, if need be, to the payment of his debts. If he attempts to evade this duty, and for the purpose of hindering, delaying or defrauding his creditors, transfers his property to others, with knowledge on the part of such grantees of such intent, such grantees will take no title to such property, as against such creditors proceeding to the collection of their claims by attachment upon said property.

(b) The court instructs the jury that if they believe from the evidence that the property in controversy was sold by ———— and in making such sale it was the intent of the seller to hinder, delay or defraud his creditors, and the plaintiff purchased said goods, and by herself, or her agent, acting for her, participated in such fraudulent purpose, or, at or before the time such sale was made, had knowledge of such facts and circumstances as would have aroused the suspicions and have put a reasonably prudent man upon inquiry, which inquiry, if pursued, would have led to the knowledge or notice of such fraudulent intent on the part of the seller, then in such case the plaintiff took no title to the property so conveyed, as against the creditors of the seller; and the fact that the plaintiff may have paid a valuable consideration, or even full value, for the goods will not render such sale good as against the creditors.[10]

(c) In determining whether the interpleader knew of S's intention to defraud, if there was such intention, the jury are instructed that it is not incumbent on the plaintiff to prove such knowledge by positive testimony, but that facts coming to the notice of the interpleader, which would put a prudent man upon inquiry, and which, if followed out, would lead to a knowledge of the fraud on the part of S, are evidences from which the jury may infer that L had knowledge of such fraud.[11]

9—Mayer et al. v. Wilkins, 37 Fla. 244, 19 So. 632 (637).

10—Brown v. Sloan, 61 Neb. 237, 85 N. W. 37, citing Bollman v. Lucas, 22 Neb. 796, 36 N. W. 465; Sunday Creek Coal Co. v. Burnham, 52 Neb. 364, 72 N. W. 487; Savage v. Hazard, 11 Neb. 323, 9 N. W. 83; Temple v. Smith, 13 Neb. 513, 14 N. W. 527; Beels v. Flynn, 28 Neb. 575, 44 N. W. 732; Farrington v. Stone, 35 Neb. 456, 53 N. W. 389; Edwards v. Reid, 39 Neb. 645, 58 N. W. 202.

11—J. Deere Plow Co. v. Sullivan, 158 Mo. 440, 59 S. W. 1005 (1009); State v. Purcell, 131 Mo. 317, 33 S. W. 13; Nat. Bank of Com. v. Brunswick T. W., 155 Mo. App. 602, 56 S. W. 283.

§ 1061. Fraudulent Conveyance—Intent to Defraud Creditors—Valuable Consideration Paid—Assignees Knowledge of Intent—What Jury May Consider—Series. (a) If the sale or transfer of the property, or an interest therein, was made with the intent to hinder, delay or defraud the creditors of L. H., and if the plaintiff knew of such intent when he purchased the same, then such sale or transfer was void as to such creditors, and the sheriff had a right to make the levy and seizure in question, and this action cannot be maintained. And, in such case, the payment of a valuable or full consideration for the property or interest purchased would not protect plaintiff, but such sale or transfer would still be void as to L. H.'s creditors.

(b) If, however, the plaintiff paid a valuable consideration for the property, and bought the same in good faith, without any knowledge of an intent on the part of L. H. to hinder, delay or defraud his creditors, then the plaintiff acquired a valid title thereto, notwithstanding any fraud if such there was, on the part of L. H.; and notwithstanding the consideration paid was not the full value of the property, should you find that such was the fact.

(c) In determining whether or not L. H. intended to hinder, delay or defraud his creditors, you may inquire into the extent of his indebtedness, and of his property, and means of meeting it; and as to how far the same was secured, whether in whole or in part; and as to whether he claimed in good faith to have a defense to any apparent indebtedness against him; and, generally, as to whether he had or had not a motive or inducement to place his property beyond the reach of creditors. But the mere fact that he claimed to have, and believed he had, a good defense against notes which he had given, would not justify him in transferring property for the purpose of protecting it against proceedings for enforcing a claim on such note.

(d) As to plaintiff's knowledge of a fraudulent intent on the part of L. H., it is not necessary that plaintiff should have had actual and positive knowledge of such intent, if it existed; but if he had knowledge of facts and circumstances tending to show the existence of such an intent, and sufficient to lead a man of ordinary perception, care and prudence to suppose that there was such an intent, this would be equivalent in law to a knowledge thereof, if in fact there was such fraudulent intent on the part of L. H.

(e) Evidence was received during the trial as to acts and declarations of L. H. prior to the transfer in question. These were received only as against him, and as tending to show a fraudulent intent on his part; but they are not evidence against the plaintiff to show fraud, or knowledge of fraud, on his part.

(f) In determining whether the transfers in question were fraudulent as to creditors, you are at liberty to consider the relation of the parties thereto to each other, the time and circumstances thereof;

whether or not L. H. was indebted beyond his means of payment, or had a motive to place his property beyond the reach of his creditors; whether or not the plaintiff knew, or had the means of knowing, his brother L's financial condition, or with what motive or purpose he was making the transfer; what the plaintiff's means of payment were, and his object in making the purchase; the value of the property, and the amount paid therefor; and all the facts and circumstances of the transaction appearing in evidence, in concluding the agreement as to the terms on which L. H. was to hold the note taken in part payment.

(g) Fraud is not to be presumed; and, in this case, the burden of proof is upon the defendant to satisfy you, by a preponderance of evidence, of a fraudulent intent on the part of L. H., and knowledge thereof on the part of the plaintiff.[12]

§ 1062. **Must be a Change of Possession—Fraud per se.** (a) That the change of the possession of personal property upon a sale thereof, must not be merely nominal or momentary; it must be real, actual and open, and such as may be publicly known, so far as the circumstances will reasonably admit of. A continued possession by the vendor of personal property, as ostensible owner, after an absolute sale, renders the sale fraudulent and void, as against creditors of the vendor.[13]

(b) That any sale of personal property, when it is permitted to remain with the vendor, if it is of that character of property that it is capable of being removed, or of having a change in the possession of it made, is fraudulent in law, as to creditors and subsequent purchasers, notwithstanding the sale may be in good faith, and for a valuable consideration.[14]

(c) You are instructed, as a matter of law, that any sale or assignment of personal property, when the possession of the property is permitted by the purchaser to remain in the seller, is fraudulent and void as against the creditors of the seller; and where the nature of the property and the situation of the parties will admit of it, in order to constitute a change of possession, there must be some outward, open, visible change in the relation of the parties to the goods, indicating a change in the possession that could be seen and known by persons dealing with the goods.[15]

§ 1063. **Must be Outward, Visible Signs of Change of Possession.** (a) The jury are instructed, that when persons are doing business as a firm, and, in the way of their business, have in their possession a stock of goods in store, and while they are so doing business, they contract debts, then no sale or assignment of such stock of goods,

12—Campbell v. Holland, 22 Neb. 587, 35 N. W. 871 (878-9).

13—Wright v. Grover, 27 Ill. 426; Sutton v. Ballou, 46 Iowa 517; Carter v. Collins, 2 Mo. App. 225; Bosse v. Thomas, 3 Ill. App. 472.

14—Ticknor v. McClelland, 84 Ill. 471.

15—Pickard v. Hopkins, 17 Ill. App. 570.

or any interest therein, will be valid, as against the creditors of the firm, unless the creditors have actual notice of the sale, or there is such a change in the possession of the goods, and of the outward and visible signs of ownership, as would indicate to the public, and to those dealing with the stock, that such sale or transfer had been made.[16]

(b) The court instructs you, that while a sale of property may be good, as between the vendor and vendee, without actual delivery, yet to make such sale valid and binding, as against the creditors of the vendor, there must be a delivery of the property so sold; and such delivery must be an actual, manual delivery, when the property is susceptible of it; and when the property is so heavy or bulky that manual delivery is impracticable, then there must be some outward public act done by way of delivering the possession, which shows an intention by the parties to change the possession from the seller to the buyer, so far as it can reasonably be done under the circumstances of the case.[17]

(c) The sale must be accompanied by an actual and continued change of possession as well as a nominal and constructive change, or the transaction will be deemed fraudulent as against creditors; and a construction which would allow the vendor or assignor of a stock of goods to continue in possession thereof, and to sell them out as the agent of the purchaser or assignee, would render the statutory provision for the prevention and detection of frauds a mere nullity, that is, if you should find that ———— was left there in charge of the goods as a mere figure-head, and there was not an honest and open transfer.[18]

§ 1064. Retaining Possession—Presumptive Evidence of Fraud. (a) The court instructs the jury, that the law presumes every sale of personal property to be fraudulent and void, as against the creditors of the seller, unless a change of possession of the property, from the seller to the purchaser, accompanies and follows the sale; and this change must be an open, visible change, manifested by such outward signs as render it evident to persons dealing with the property, that the possession of the former owner, as such, has ceased.[19]

16—Wright v. McCormick, 67 Mo. 426.

17—Ticknor v. McClelland, 84 Ill. 471; Allen v. Carr, 85 Ill. 388.

18—Hopkins v. Bishop, 91 Mich. 328, 51 N. W. 902, 30 Am. St. Rep. 480.

"The jury should have been instructed that, if they found that the possession of these goods was not actually and continually in the plaintiff from the delivery up to the time of the levy, then it was for him to show that the sale was an honest one. It would not be necessary that the plaintiff himself should remain at the store and personally manage the business. He had the right to select an agent to do this for him. But he could not select a vendor of the goods as such agent, unless something was done to give the public to understand that the possession of the vendor was the possession of the plaintiff; that there had been a change in the ownership of the goods. This change must be an 'open, visible, substantial' one. Clark v. Lee, 78 Mich. 231, 44 N. W. Rep. 260."

19—Osborne v. Ratliffe, 53 Ia. 748, 5 N. W. 746.

(b) You are further instructed, as a matter of law, that where a sale of personal property is alleged to have been made, and there is no change in the possession of the property accompanying or following the sale, then the law presumes that such sale was made with intent to hinder, delay or defraud the creditors of the seller; and to render such a sale valid and binding, as against such creditors, the burden of proof is on the purchaser to show, by a preponderance of evidence, that the sale was bona fide and honest, and not designed as a mere trick to cover up the property.[20]

§ 1065. Possession of Personal Property Evidence of Ownership—Fraud. (a) The court instructs the jury, that when one person sells personal property to another, and retains possession of it, the property would be subject to levy under an execution against the seller, so long as it remains in his possession, such a sale being, in law, fraudulent, as against subsequent purchasers in good faith, and execution creditors of the seller.[21]

(b) The court instructs the jury, that possession of personal property is prima facie evidence of ownership, if there are no circumstances accompanying the possession to rebut the presumption of ownership; and if the jury believe, from the evidence, that the plaintiff had been in possession of the property in question for ——— months, prior and up to the time it was taken, and under circumstances indicating ownership in him, then it is incumbent upon the defendant to show, by a preponderance of testimony, that the title was not in the plaintiff, and unless he has done so, they should find for the plaintiff, as to the ownership of the property.[22]

§ 1066. Change of Possession—Only Such Change Required as can Reasonably be Made Where Articles Are Heavy and Cumbersome. (a) In determining what it takes to constitute a delivery and change of possession of personal property upon a sale of it, the jury should take into consideration the character of the property, and the situation of the parties at the time of the sale; and in this case, if the jury find, from the evidence, that the plaintiff purchased the property in question in good faith, and for a valuable consideration, before the execution, introduced in evidence, came into the hands of the officer (or was levied upon the property), that plaintiff had done everything which could reasonably be done, under the circumstances, by way of taking possession of the property, under the sale to him, then the property would not be liable to be taken on the execution.[23]

(b) That the rule of law requiring a change of possession of personal property upon the sale of it, in order that the sale shall not be fraudulent as against creditors, only requires such a change of

20—Webster v. Anderson, 42 Mich. 554; Stern v. Henley, 68 Mo. 262; Geisendorff v. Eagles, 70 Ind. 418.

21—Smith on Fraud, 164; Bump Fraud. Con. 60.

22—Bergen v. Riggs, 34 Ill. 170.

23—Bump Fraud. Conv. 165;

possession as the articles sold will conveniently and reasonably admit of, and in the case of heavy and cumbersome articles, an actual delivery of any essential part thereof, with the intention of delivering the whole, is, in law, equivalent to a delivery of the whole article sold.[24]

§ 1067. Delivery of Personal Property Necessary—Assumption of Ownership. The court instructs you, that although a delivery of personal property sold is necessary to pass the title thereto, as against the creditors of the seller, yet such delivery need not necessarily be an actual delivery; but anything which clearly shows a surrender of ownership by the seller, and an assumption of ownership by the purchaser, accompanied by such circumstances as would reasonably advise the world of such change of ownership, is all that is necessary on that point.[25]

§ 1068. Property in Possession of Third Person—Symbolical Delivery. (a) The court instructs the jury, that where personal property is sold, which, at the time of the sale, is in the actual possession or under the control of a third person, no other delivery of such property is necessary, than that the seller and purchaser, together with such third person, should agree that such third person should thereafter keep possession of the property for the purchaser, and he does so keep possession.[26]

(b) The jury are instructed, that the transfer of a bill of lading, on a sale or pledge of the property shipped, is a symbolical delivery of the property to the purchaser or pledgee, and, if proved, is a good delivery of the property as against the creditors of the shippers.[27]

§ 1069. Possession by Agent. That a party may be in possession of personal property, by his agent as well as by himself, and if the goods are sold in good faith, and for a valuable consideration, and the possession is delivered to the purchaser, it is not necessary that he should remain in the actual possession of the property to guard his title; but such possession may be by an agent, and such agent may be the seller of property, if the possession is such as reasonably to advise the creditors of the change in the title of the property.[28]

§ 1070. Possession of Growing Crops. The court instructs the jury, that upon the sale of personal property, where the goods are purchased, and are incapable of being handed over from one to another, there need not be a manual delivery; and in the case of the sale of standing crops, the possession will be in the vendee until it is

Cartright v. Phoenix, 7 Cal. 281; Allen v. Smith, 10 Mass. 308; Chase v. Ralston, 30 Penn. St. 539.

24—1 Pars. on Cont. 443.

25—Pickard v. Hopkins, 17 Ill. App. 570.

26—Pickard v. Hopkins, 17 Ill. App. 570.

27—1 Pars. on Cont. 443; Mich. Cent. Rd. Co. v. Phillips, 60 Ill. 190.

28—Warner v. Carleton, 22 Ill. 415.

time to harvest them, and until then he is not required to take manual or actual possession of them.[29]

§ 1071. **Taking Possession by Vendee—Subsequent Loan to Vendor.** If the jury believe, from the evidence, that the plaintiff purchased the property in good faith, and paid a valuable consideration therefor, and then took actual possession of the property under such sale, and continued such possession long enough and under such circumstances as to apprise the public generally of a change in the ownership of the property, then, although the jury should find, from the evidence, that the plaintiff loaned the property temporarily to the said A. B., this would not alone render the sale fraudulent or void (or not presumptive evidence of a fraudulent sale, etc.), as against the creditors of the said A. B.[30]

§ 1072. **Fraudulent Conveyance—Innocent Purchaser—What is Sufficient Notice of Fraudulent Intent.** (a) The deed from H. to W. shows the conveyance by said H. to said W. of whatever interest he might have or acquire in the estates of his mother, his brothers and sisters. The law presumes that the acquisition of these interests by said W. was by fraud. The defendant K. is in law conclusively held to know of such deed, and the presumption of fraud attaching to the acquisition of the interests secured. You will determine whether the knowledge of K. of these facts, and of the legal presumption attaching to the same, was sufficient to put a reasonably prudent man upon inquiry as to whether or not the interest in his father's estate by said H. in said deed conveyed was procured by fraud. If you find that it was, and that such inquiry, if made and pursued with reasonable diligence, would have led to the knowledge of said fraud, then you are instructed that said K. is not an innocent purchaser.[31]

(b) The court instructs the jury for the plaintiff, that although you may believe from the evidence, that the sale by P. to F. was made or contrived with the intent or purpose to delay his creditors, yet, before you can find for defendant M., you must also believe, from a preponderance of the evidence, that R. contrived the conveyance, with malice, fraud, covin, collusion or guile, for the purpose of hindering or delaying said creditors.

(c) The court instructs the jury for the plaintiff, that an innocent third party is to be protected in his rights of purchase and payment of money, and in this case, unless you believe, from the evidence, that the plaintiff confederated with P. and F. and purchased the goods to hinder and delay P.'s creditors in the collection of their debts, and was not a bona fide purchaser, your verdict should be for the plaintiff.[32]

29—Ticknor v. McClelland, 84 Ill. 471.

30—Cunningham v. Hamilton, 25 Ill. 228.

31—Feary v. O'Neill, 149 Mo. 467, 50 S. W. 918, 73 Am. St. Rep. 440.

32—Mathews v. Reinhardt, 149 Ill. 635 (643), 37 N. E. 85.

(d) The court instructs the jury, that when a transfer of property is made, with intent on the part of the person making it to hinder, delay or defraud his creditors, and the party to whom the transfer is made has knowledge of facts and circumstances from which such fraudulent intent might reasonably and naturally be inferred, by an ordinarily cautious person, then such transfer is fraudulent and void as against the rights of the creditors.[33]

§ 1073. Innocent Purchaser—Notice—Participation in Fraud—Valid as to Creditors. (a) The plaintiff was not a creditor of X., but a purchaser; and if he had knowledge of facts sufficient to put an ordinarily prudent man on inquiry, such knowledge on the part of Y. would be sufficient to avoid the sale, without any active participation in the fraud by him.[34]

(b) And in this case, if you believe, from all the facts and circumstances attending the sale in question, as shown by the evidence, that the sale was bona fide, and for a valuable consideration, and not made with intent, or for the purpose of hindering, delaying or defrauding the creditors of the said A. B., then such a sale is as valid and binding as though the possession of the property had passed to the plaintiff at the time of the sale.[35]

§ 1074. Purchaser must be Chargeable with Notice or Have Knowledge of Fraud. (a) The jury are instructed, as a matter of law, that it is not sufficient, to vitiate a sale of personal property, that it was made by the vendor to hinder, delay or defraud his creditors. In order to vitiate such sale as against the purchaser, he must have had knowledge or notice of such intent on the part of the seller.[36]

(b) The court instructs you, that while our statute declares, every sale or assignment which is made with intent to defraud, hinder or delay creditors in the collection of their debts void, still such sale or assignment will not be void as against the purchaser, unless he

33—Boies v. Henney, 32 Ill. 130.

34—Allen v. Stingel et al., 95 Mich. 195, 54 N. W. 880.

"The law does not prohibit honest sales of goods upon credit, even though the seller is in debt at the time. It cannot be said that the giving of negotiable notes was not a sufficient consideration for a sale, and it is very clear that a part of the purchase price was paid by plaintiff. Dixon v. Hill, 5 Mich. 404; Lewis v. Rice, 61 Mich. 97, 27 N. W. 867; Wait v. Kellogg, 63 Mich. 138, 30 N. W. 80. These requests, except the above, assume certain facts to exist, when there is evidence from which the jury might make a different finding. Under such circumstances, they should not be given. Lewis v. Rich, 61 Mich. 97, 27 N. W. 867. The plaintiff did not claim upon the trial that when he made the purchase of the stock, he was a creditor of X. This being so, defendant was entitled to have the above request given. Hough v. Dickinson, 58 Mich. 89, 24 N. W. 809; Bedford v. Penny, 58 Mich. 424, 25 N. W. 381."

35—Crawford v. Kirksey, 55 Ala. 282; Robinson v. Uhl, 6 Neb. 328; Morgan v. Bogue, 7 Neb. 429; McCully v. Swackhamer, 6 Oreg. 438.

36—Miller v. Kirby, 74 Ill. 242; Hatch v. Jordan, 74 Ill. 414; Preston v. Turner, 36 Ia. 671; Drummond v. Couse et al., 39 Ia. 442; Loss v. Wilkinson, 110 N. Y. 195, 18 N. E. 99, 1 L. R. A. 250, 4 L. R. A. 353.

knew, or had good reason to suppose, that the sale was made by the seller with intent to defraud his creditors, or to hinder or delay them in the collection of their debts.[37]

(c) You are instructed that to impeach a sale of personal property upon the ground of a fraudulent intent on the part of the seller, it is not necessary to establish a fraudulent intent on the part of the purchaser; it will be sufficient if the evidence shows that he knew of the fraudulent intent of the seller, or had notice of such facts as would have put a man of ordinary prudence upon inquiry, which would have led to a knowledge of the fraudulent purpose of the seller.[38]

§ 1075. **Fraudulent Intent and Knowledge of Purchaser Lacking—Adequacy of Consideration Immaterial.** If the jury believe, from the evidence, that the plaintiff actually, and in good faith, purchased the property in question from L. H., without any fraudulent intent on his part, and with no knowledge of a fraudulent intent on the part of his grantor, then it is wholly immaterial whether or not the consideration paid, either in money or notes, was equal to the value of the property so purchased by plaintiff.[39]

§ 1076. **Creditor not Affected by Knowledge, When.** The jury are instructed, that when a person purchases goods with the knowledge that his vendor intends by the sale to defraud his creditors, or to hinder and delay them in the collection of their debts, such purchaser will not be affected if he takes the goods, in good faith, in payment of an honest debt. A creditor violates no rule of law when he takes payment of his debt, though he knows that other creditors are thereby deprived of all means of obtaining satisfaction of their own equally meritorious claims.[40]

§ 1077. **Insolvency—Knowledge of Purchaser.** If the jury believe from the evidence that S. was insolvent, and that L. knew that S. was insolvent, and with such knowledge gave to S. the note for $—— payable on or before two years after date, as a part consideration of the purchase, then the sale of the stock of goods to interpleader was fraudulent in law, and your verdict will be for plaintiff on the interplea.[41]

§ 1078. **Sale on Credit—Application of Proceeds.** The jury are further instructed, as a matter of law, that in the case of an absolute and unconditional sale of goods, the fact that the vendor was indebted at the time, that the sale was on credit, and that notes taken

37—Bump Fraud Conv. 195; Preston v. Turner, 39 Ia. 671; Gentry v. Robinson, 15 Mo. 260; Lipperd v. Edwards, 39 Ind. 165; Hicks v. Stone, 13 Minn. 434; Fluegel v. Henschel, 7 N. D. 276, 74 N. W. 996, 66 Am. St. Rep. 642.

38—Jones v. Hetherington, 45 Ia. 681; Zuver v. Lyons, 40 Ia. 510.

39—Campbell v. Holland, 22 Neb. 582, 35 N. W. 871 (879).

40—Gray v. St. John, 35 Ill. 222.

41—J. Deere Plow Co. v. Sullivan, 158 Mo. 440, 59 S. W. 1005 (1009).

for the unpaid price were to be used in the payment of his debts, will not alone establish fraud in such sale as against his creditors.[42]

§ 1079. Right to Prefer Creditors. (a) The jury are instructed, that a person who is indebted and unable to pay all his debts in full, has a right to prefer any one, or more, of his creditors to the exclusion of all the others; and in the payment of a bona fide indebtedness to one of his creditors, a debtor may exhaust the whole of his property, so as to leave nothing for the other creditors, who are equally meritorious.[43]

(b) And in this case, if you believe, from the evidence, that M. was lawfully indebted to defendant, and finding that he could not pay all his debts, transferred the goods in controversy to defendant, in payment, or in part payment, of such indebtedness, then, upon the question of the ownership of the goods, you should find a verdict for the defendant, unless you further believe, from the evidence, that the defendant had notice of the fraud practiced by M. in obtaining possession of the goods, if such fraud has been proven.[44]

§ 1080. When Fraudulent—Creditor May Take Payment or Security in Preference to Others if Acting in Good Faith. In order to avoid the conveyance on the ground of fraud, there must be a real design on the part of the debtor to prevent the application of his property, in whole or in part, to the satisfaction of his debts. A creditor violates no rule of law when he takes payment or security for his demand, if done in good faith, though others are thereby deprived of all means of obtaining satisfaction of their equally meritorious claims.[45]

§ 1081. Preference of Creditors—Insolvency—Intent—Payment of Antecedent Debt. (a) If the jury believe from the evidence that E., although insolvent or in failing circumstances, made an absolute sale of his property to E. in payment of an antecedent debt by way of preference over other creditors—the debt being honestly due, and the price or consideration received being fair and adequate, and no interest being reserved by E.—his mere fraudulent intent does not vitiate the conveyance, because the act itself was legal, and fraud without damage gives no right of action; and these concurrent facts rebut all inferences that might be drawn from attendant badges of fraud, and impart validity to the conveyance as an allowable preference to the said Ely.

(b) If the jury believe from the evidence that E., although at the time insolvent, or in failing circumstances, made an absolute sale of the property in controversy to Ely in payment of an antecedent debt, by way of preference over other creditors; the debt being

42—Miller et al. v. Kirby, 74 Ill. 242.

43—Kitchen v. McCloskey, 150 Pa. 376, 24 Atl. 688, 30 Am. St. Rep. 811; Bump Fraud. Conv. 183; State v. Laurie, 1 Mo. App. 371; Green v. Tanner, 49 Mass. 411; Kemp v. Walker, 16 Ohio 118; Hubbard v. Taylor, 5 Mich. 155.

44—Butters v. Haughwout, 42 Ill. 18.

45—Gray v. St. John, 35 Ill. 222. See note 50.

honestly due, and the price or consideration received being fair and adequate, and no interest being reserved by E., his mere fraudulent intent does not vitiate the conveyance, because the act was legal,—then the jury will find for the claimant, Ely.

(c) If the jury believe from the evidence that E. paid Ely an antecedent debt by conveying the property to him; that the debt was honestly due, and was not materially less than the value of the property conveyed, and no interest or benefit was reserved to E.—then the conveyance was lawful and is not affected by fraudulent attempt on the part of both the parties thereto; then they should find for the claimant, Ely.

(d) If the jury believe from the evidence that E., the insolvent debtor, paid an antecedent debt by conveyance of his property to the creditor Ely, if the debt was honestly due, and not materially less than the value of the property conveyed, and no interest or benefit was reserved to the debtor E., then the conveyance was lawful, and the jury will find for the claimant Ely, although a fraudulent intent may have existed at the time on the part of one or both of the parties thereto.[46]

46—Bray et al. v. Ely, 105 Ala. 553, 17 So. 180.

"The principles which govern the determination of the validity of sales or conveyances made by an insolvent debtor, or a debtor in failing circumstances, to a creditor, in payment of a pre-existing debt, having notice of his condition or insolvency, when the sale or conveyance is attacked for fraud by other creditors, have been of such frequent consideration and decision that it would seem a necessity for their reiteration could scarcely occur. So far as now relevant in Bank v. Smith, 93 Ala. 97, 9 So. 548, they were concisely and clearly summarized by Chief Justice Stone: 'An insolvent debtor may select which of his creditors—one or more—he will pay, and pay them in full and thus disable himself to pay the others anything; and it makes no difference if the one or more preferred creditors know the effect of the transaction will be to deprive the debtor of all means with which to pay his other debts. Nor is the wish, motive or intention of the debtor a material inquiry, if the requisite conditions exist. Those conditions in a case like the present are: First, the debt must be bona fide and enforceable, not simulated; second, the payment must be absolute, and if made in property must not be materially in excess of the debt; third, no pecuniary benefit or consideration of value must inure or be secured to the debtor.' The several instructions given to the jury on the request of the appellee state these principles substantially, though in varying language. Some, if not all of them may be subject to the objection that they are argumentative, now urged by the appellants, and for that reason could have been properly refused by the court below. There is no error in the refusal of an argumentative instruction, for the reason that instructions should be clear and concise, presenting only the point or matter of law on which the party presenting them may rely. If the party requesting them will not so frame the instruction, but passing beyond the presentation of the point or matter of law, injects an argument of the case, the trial court does not err in the refusal of the instruction. But in our practice the giving or refusal of such instructions rests largely in the discretion of the trial court, which is not revisable on error. Whilden v. Bank, 64 Ala. 1. We do not regard either of the instructions as assuming as proved or as existing, any fact, either disputed or dependent on the weight or credibility of the evidence. If it was apprehended that either of them gave an undue prominence to any phase of the

§ 1082. **Fraudulent Intent—Fraud Must be Proven—Preference of Creditor.** (a) The court instructs the jury that any fraudulent intent that M. might have had in making the deed of trust in evidence is not enough to vitiate it. It devolves upon the defendant in this case to show by tangible evidence that the plaintiff, F., participated in such fraudulent intent, if any, and purposely aided M. to defeat his other creditors by covering up the property of M. in some improper way, to the use and benefit of the said M.

(b) The jury are instructed that, although fraud need not be proven by direct testimony, and may be inferred from circumstances, still it will never be presumed, but must be proven by some tangible and substantial facts in evidence, from which it may be fairly inferred; and in this case the burden is on the defendant to show by a preponderance of the testimony that M. fraudulently executed the chattel deed of trust offered in evidence, and that the plaintiff, F., participated in such fraud; and, if the facts and circumstances shown in evidence are as consistent with an honest purpose on the part of said F. as with the dishonest one, then it is your duty to believe his purpose honest.

(c) The court instructs the jury that, even though M. was in failing circumstances, he had a right to prefer any one or more of his creditors to the exclusion of the rest, although his doing so operated to defeat his other creditors in the collection of their claims; and if the plaintiff, F., took the deed of trust in evidence for the purpose of securing the debts therein named, and did not know of and participate in some fraudulent design of the said M., if he had any, the deed of trust is valid, and you must find for the plaintiff.[47]

§ 1083. **Fraudulent Preference—Bankruptcy—Preponderance Defined—Insolvency Defined—How Proven.** (a) In order to entitle the plaintiff to recover in this action, he must establish by a preponderance of the evidence, first that the S. G. Co. was at the time of the transactions complained of, insolvent; second, that the result of the transfers of money and property was to give to the defendants a greater percentage of their claim than any other creditor of the bankrupt of the same class; third, that the defendants, or one of them, had reasonable cause to believe that this result was intended; and fourth, that such transactions occurred within four months of the filing of the petition in bankruptcy; and in order to justify you in finding a verdict for the plaintiff, each and all of the propositions must be established by a preponderance of the evidence. By a preponderance of the evidence is meant the greater weight of the evidence—that which is the more convincing of its truth. It is not necessarily determined by the number of witnesses for or against a

evidence or of the case, the appellants should have protected themselves from injury by a request for explanatory or additional instructions." See note 50.

47—Feary v. O'Neill, 149 Mo. 467, 50 S. W. 918, 73 Am. St. Rep. 440.

proposition, although all other things being equal, it may be so determined.

(b) A person or corporation is insolvent whenever the aggregate of its property, exclusive of any property conveyed, transferred, concealed or removed, or permitted to be concealed or removed with intent to defraud, hinder or delay creditors, is not, at a fair valuation, sufficient in amount to pay its debts.[48]

(c) The court instructs the jury that B.'s deposition as to his pecuniary condition is evidence which may be considered on the question of his solvency, and insolvency does not have to be shown by a judgment and return of "No property."[49]

§ 1084. **Preference of Creditors of an Insolvent Corporation—Series.** (a) The court instructs you that a corporation in failing circumstances has a right to prefer one or more creditors over other creditors, and to that end execute a chattel deed of trust, securing one or more of its creditors to the exclusion of others, and such conveyance is not rendered invalid because, in effect, it hinders and delays creditors not so preferred.

(b) The court instructs you that a corporation in failing circumstances may prefer one or more creditors in preference to others in discharging its obligations, if such preference is made in good faith, while the property of the company is in its possession; and the mere insolvency of a corporation does not, of itself, transfer its assets into a trust fund for the benefit of all its creditors; nor can it be said that such a chattel deed of trust, though it conveys all the property of the corporation to a trustee for the benefit of particular creditors in preference to other creditors, is an assignment, within the meaning of the statute of assignments, for the benefit of creditors. There is a clear distinction between such a conveyance by deed of trust, and an assignment for the benefit of creditors generally. A corporation may convey its property in trust by chattel deed of trust, preferring one or more creditors in preference to others, precisely the same as an individual or partnership may do.

(c) The court further instructs you that if you believe and find from the evidence that the debts secured in favor of R., and in favor of L., by the terms of said deed of trust, read in evidence, were both bona fide indebtedness for money actually lent in good faith to the P. R. & S. Company, to the full extent of the claims secured to said R. and said L., then the mere fact that R. was one of the creditors and an officer of the P. R. & S. Company, and that O. was another director and officer of said company, and was interested in the indebtedness secured in favor of said L., would not affect the validity of said deed of trust.

(d) The court instructs you that all the instructions given in this case are to be read and considered together in determining your ver-

48—Wilkinson v. Anderson-Taylor Co., 28 Utah 346, 79 Pac. 46 (47).

49—Williamson v. Tyson, 105 Ala. 644, 17 So. 336 (338).

dict, as each and all of said instructions constitute a part of the law applicable to the case.

(e) Under the evidence the directors of the P. R. & S. Company could hold a meeting of the board of directors at any time or place when all the directors were present; and if you believe and find that on ———, the board of directors of that company was composed of O. and R., and that they met as a board at the residence of said P., and unanimously adopted a resolution that a deed be made and executed by the officers of the company conveying to said J. H. G. all the property of said company, in trust, for the purpose of selling same, and applying the proceeds to the payment of the debts of said company therein mentioned, which deed is the one read in evidence, any subsequent action or conduct by said P., in the direction of a repudiation of his vote at said board meeting in favor of the execution of said deed, was ineffectual to invalidate his said vote or the action of said board.

(f) The court instructs the jury that whenever the directors of an insolvent corporation attempt, by their own votes, to prefer themselves as creditors of such corporation, the burden of showing that the debts of said directors so preferred are actual and bona fide is cast upon the persons claiming the benefit of such act; and unless the jury believe from the evidence in the case, that the relator has shown, by a preponderance of evidence, that the debts due R. and L., set out in the deed of trust read in evidence, were the actual and bona fide indebtedness of the P. R. & S. Co., then the jury must find that the said deed of trust was fraudulent; and if they believe from the evidence that the relator herein in the way participated in such fraudulent transaction, if the jury believe it was fraudulent, then the jury must find for defendants.

(g) The court instructs the jury that whenever the directors of an insolvent corporation attempt, by their own votes to prefer themselves as creditors of such corporation, the law presumes that such acts of directors, in attempting to prefer themselves, is a fraudulent act, and the burden of showing that it was honest and fair is cast upon the persons claiming the benefit of such act, to show, by a preponderance of evidence, that such preference was honest, and that such directors acted in good faith; and unless the jury believe, from the evidence in this case, that the relator has shown, by a preponderance of evidence, that R. and O. acted in perfect good faith and honesty in voting to execute the deed of trust referred to in the evidence, then the jury must find that said deed of trust was fraudulent, and, if they believe from the evidence that the relator herein in any way participated in such fraudulent transaction, if the jury believe it was fraudulent, then the jury must find for defendants.

(h) The court instructs the jury that the knowledge of G., the trustee in said chattel deed, in respect to the unlawful scheme and purposes of said O. and R., if such there were, is imputable to the creditors named therein, and they are affected thereby.

The court instructs the jury that if, from all the evidence, they believe that the chattel deed herein was not made and executed in good faith, their verdict should be for the defendants.

(i) The court instructs the jury that if they believe from the evidence that the resolution set out in the minutes of the meeting, December 19, 1895, authorizing the execution of a trust deed therein referred to, was adopted by the board of directors at such meeting then the jury are instructed that there was no authority on the part of the directors to execute the deed of trust in question.

(j) The court instructs the jury that it is not necessary to establish a fraudulent intent by direct and positive evidence, but that an intent to defraud may be established by inference, in the same way as any other fact, by taking into consideration the acts of the parties and all the facts and circumstances of the case.[50]

§ 1085. Preferring Wife as Creditor—Husband May Give to Wife When. (a) A husband indebted to his wife, may prefer her to his other creditors, and make a valid appropriation of his property to pay her claim, even though he is thereby deprived of the means to pay other debts.[51]

(b) A husband out of debt, or when it does not injure existing creditors, may settle property on his wife, either by having it conveyed directly to her, or to another in trust for her, and subsequent creditors cannot reach it, and the money in question, if the jury believe, from the evidence, that it was realized from the sale of such property, will be hers.[52]

§ 1086. Conveyances Between Husband and Wife—Presumption—Scrutinized Closely. (a) The jury are instructed that transactions between husband and wife in relation to the sale or transfer of property from one to the other, whereby creditors are prevented from collecting their just dues should be scrutinized very closely, and the bona fides of such transaction should be established satisfactorily, by a preponderance of the evidence.

(b) The jury are instructed that, in a contest between the wife and the creditors of her husband in regard to property transferred by him to her, there is a presumption against her, which she must overcome by affirmative proof, and prove by a preponderance of the evidence the bona fides of the sale.[53]

(c) Should you find, as claimed by the plaintiff, M. A., that some

50—State ex rel. Grimm v. Man. Rubber Mfg. Co. et al., 149 Mo. 181, 50 S. W. 321 (329).

It will, of course, be understood that such a preference as is described in these instructions would be a violation of the U. S. Bankruptcy Act, and would be an act of bankruptcy. Many states have insolvency laws which render the preferences of creditors fraudulent and such instructions based upon the common law would not be proper.

51—Ferguson v. Spear, 65 Me. 277; Hill v. Bowman, 35 Mich. 191; Riley v. Vaughan, 116 Mo. 169, 22 S. W. 707, 38 Am. St. 586.

52—Lincoln v. McLaughlin, 74 Ill. 11; Adone v. Spencer, 62 N. J. Eq. 782, 49 Atl. 10, 90 Am. St. Rep. 484, 56 L. R. A. 817.

53—Carson v. Stevens, 40 Neb. 112, 58 N. W. 845, 42 Am. St. 661;

time in 1897, at the time when her husband was free from indebtedness, that he made the transfer and gave her all his property, and that the transfer was made in good faith, and was made without intent to defraud creditors then existing or subsequent creditors of the said C. A., as claimed by the plaintiff in this action, in that event you should find for the plaintiff on all the issues.[54]

(d) You are instructed that if you believe, from the evidence in this case, that the purchase price of the land in controversy, or any portion of the same, was paid for either with the separate estate of N. L. C., or community estate of N. L. C. and M. J. C., but at the time of the purchase of the said land, and the payment therefor, it was the intention and the purpose of the said N. L. C. and M. J. C. that the land so bought should be and become the separate estate of M. J. C., then you are instructed (the plaintiff, W., having notice of the claim of M. J. C. before his purchase) that the law would recognize and protect the land so bought as the separate estate of M. J. C., and if you find the facts to be so you will find for the defendant,

Bank v. Bartlett, 8 Neb. 328, 1 N. W. 199; Stevens v. Carson, 30 Neb. 544, 46 N. W. 655.

54—Aldous v. Olverson, 17 S. D. 190, 95 N. W. 917 (920).

"One who is not a creditor at the time the conveyance is made, so long as the conveyance is not withheld from record, and was not made with the intent of defrauding subsequent creditors, is not prejudiced by the conveyance. Schreyer v. Scott, 134 U. S. 405, 10 Sup. Ct. 579, 33 L. Ed. 955; Todd v. Nelson, 109 N. Y. 316, 16 N. E. 360; Cole v. Brown, 114 Mich. 396, 72 N. W. 247, 68 Am. St. 491; Trebilcock v. Big Mo. Min. Co., 9 S. D. 206, 68 N. W. 330; Smith v. Vodges, 92 U. S. 183, 23 L. Ed. 481; Moore v. Page, 111 U. S. 117, 4 Sup. Ct. 388, 28 L. Ed. 373; Jones v. Clifton, 101 U. S. 225, 25 L. Ed. 908; Brundage v. Cheneworth, 101 Iowa 256, 70 N. W. 211, 63 Am. St. 382."

"In the latter case the Supreme Court of Iowa, after a full review of the cases decided by that court, lays down the rule applicable to this class of cases as follows: 'We think the correct rule is: (1) A conveyance which is merely voluntary, and when the grantor has no fraudulent view or intent, cannot be impeached by a subsequent creditor. (2) A conveyance actually and intentionally fraudulent as to existing creditors, as a general rule, cannot be impeached by subsequent creditors. (3) If a conveyance is actually fraudulent as to existing creditors, and merely colorable, and the property is held in secret trust for the grantor, who is permitted to use it as his own, it will be set aside at the instance of subsequent creditors. The second rule above laid down is subject to some exceptions, among which may be mentioned cases in which the conveyance is made by the grantor with the express intent and view of defrauding those who may thereafter become his creditors; cases wherein the grantor makes the conveyance with the express intent of becoming thereafter indebted; cases of voluntary conveyances when the grantor pays existing creditors by contracting other indebtedness in a like amount, and wherein the subsequent creditors are subrogated to the rights of the creditor whose debts their means have been used to pay; cases in which one makes a conveyance to avoid the risks of losses likely to result from new business ventures or speculations.' It will be noticed by the second rule laid down that 'a conveyance actually and intentionally fraudulent as to existing creditors, as a general rule, cannot be impeached by subsequent creditors,' though it is subject to exceptions, among which may be mentioned cases in which the conveyance is made by the grantor 'with the express intent and view of defrauding those who may thereafter become his creditors, or cases wherein the grantor makes the conveyance with the express intent of becoming thereafter indebted.'"

whether said property was purchased with the separate estate of M. J. C. or not.[55]

§ 1087. **Sale to Relatives not Necessarily Fraudulent—Right to Prefer Creditors.** (a) A man has a perfect right to deal with his friends and relations,—to buy or sell from or to them, and the presumption of law is, that the dealings between relatives are fair and honest, without any fraudulent intent, and no presumption of fraud attaches to such dealings; and if a man finds himself in failing circumstances he has a right to prefer one creditor to another,—to so dispose of his property that one of his creditors shall receive his pay in full and others receive nothing. Nor is there any presumption of fraud in so doing.[56]

(b) Transactions between mere relatives, no one else being present, are always viewed with suspicion, and their evidence must be received with many grains of allowance; but if it is of such a nature as to carry conviction to your minds that said witnesses are telling the truth, then it is entitled to as much consideration as that of any other witness.[57]

§ 1088. **Where Vendee Agrees to Pay Vendor's Debts—Good Consideration.** (a) If you believe, from the evidence, that C. was indebted to third persons at the time of the sale to the plaintiff, if such sale has been proved, and that the plaintiff agreed to pay such debts, this would constitute a good consideration for the sale to the plaintiff, if the sale was made in good faith.[58]

(b) That a conveyance or sale of property made with the intent, on the part of the vendor, to delay, hinder or defraud a particular creditor in the collection of his debts, is void as against all the creditors of the vendor, if the intent be known to or participated in by the vendee, although made for a good and valuable consideration.[59]

55—Clardy et ux. v. Wilson, 24 Tex. Civ. App. 196, 58 S. W. 52 (53). "While we do not desire to approve the requested charge as the most appropriate that could have been prepared, we think that it was sufficient to impose on the court the duty of giving in charge to the jury the rule invoked. We understand the rule to be that the taking of the deeds in the wife's name did not make it her separate property, but made it prima facie community property, and that the burden of proving that it was not community property was upon the Cs. If, however, it was, at the time of the purchase, intended by the husband to be the wife's separate property, and the deeds were made accordingly, and so accepted by the wife, such intention would be binding on the husband and his heirs and those claiming under him with notice. The question as to intention and notice are questions of fact to be determined like any other facts. Presidio M. Co. v. Bullis, 68 Tex. 587, 4 S. W. 860."

56—Schroeder v. Walsh, 120 Ill. 410, 11 N. E. 70; Wightman v. Hart, 37 Ill. 123; Waterman v. Donalson, 43 Ill. 29; Bump on Fraud. Conv. 56.

57—Martin et al. v. Buffalo et al., 121 N. C. 34, 27 S. E. 995.

58—Warner v. Carleton, 22 Ill. 415.

59—Bump Fraud Conv. 198; Nelson v. Smith, 28 Ill. 495; Chappell v. Clapp, 29 Ia. 191; Harrison v. Jaquess, 29 Ind. 208; Castro v. Illies, 22 Texas 479; Gardiner v. Otis, 13 Wis. 460.

§ 1089. Person Indebted May Sell His Property—Not Fraudulent—Sound Mind. (a) The jury are instructed, that although a sale of a debtor's property may have the effect to hinder and delay his creditors in the collection of their debts, this fact alone will not render the sale fraudulent or void; a debtor, however insolvent, may lawfully sell his property, even for less than its worth, if it is done with a bona fide intention of applying the proceeds in discharge of any legal liability.[60]

(b) If you find from the evidence that ———— was at the date of making said deed, ————, a person of sound mind, and capable of transacting his business, you will find for defendant.[61]

(c) You are instructed that a debtor is not deprived of his right to sell or dispose of his property by reason merely of insolvency or embarrassed financial condition, even though a sale or disposition thereof may hinder or delay his creditors.[62]

§ 1090. Sufficiency of Property Left to Pay Debts. If you believe from the evidence that the deed, from G. to his wife, was in her iron box containing her private papers during her lifetime, and if you further believe from the evidence that the said G. was at the date of said deed possessed of sufficient property, exclusive of the northeast quarter of outlot number sixty-two (62), in W., to meet his obligations then existing at the time, you will find your verdict for defendant.[63]

§ 1091. Title of Personal Property Purchased in Name of Another—Not Subject to Execution. If you believe from the evidence that the defendant, on or about the ——— day of ———, under an execution in favor of A. & Co. v. M. & E., levied on and sold a stock of goods and merchandise which was bought by plaintiffs with money of R. M., but the title thereto was taken in the names of plaintiffs,

60—Bump Fraud. Conv. 44; Nelson v. Smith, 28 Ill. 495.

61—Batman v. Snoddy, 132 Ind. 480, 32 N. E. 327.

"This instruction was correct. . . . If the intestate was of sound mind when he made the deed, he had the right to convey his land to his son for any lawful consideration, or as a gift, if he so desired. First Nat. Bk. of Indpls. v. Root, 107 Ind. 224, 8 N. E. 105; Louisville, N. A. & C. Railroad Co. v. Thompson, 107 Ind. 442, 8 N. E. 18 and 9 N. E. 357; Henry v. Stevens, 108 Ind. 281, 9 N. E. 356; Chi., St. L. & P. R. R. Co. v. Bills, 104 Ind. 13, 3 N. E. 611; Purcell v. English, 86 Ind. 34, 44 Am. Rep. 255; Bremmerman v. Jennings, 101 Ind. 253; Weis v City of Madison, 75 Ind. 241; Bingham v. Stage, 123 Ind. 281, 23 N. E. 756.

62—Mears v. Gage et al., — Mo. App. —, 80 S. W. 712 (714).

"Neither insolvency nor financial embarrassment constitutes a legal barrier to the right of the insolvent or embarrassed to trade, nor do they taint his commercial transactions with fraud. Rupe v. Alkire, 77 Mo. 641; Dougherty v. Cooper, id. 528; Feder v. Abrahams, 28 Mo. App. 454. It was not error therefore to instruct the jury as was in substance done, that fraud could not be inferred from the mere fact that T. was insolvent or financially embarrassed at the time of making the trade with M."

63—Gonzales et al. v. Adoue et al., 94 Tex. 120, 58 S. W. 951 (952).

then said goods and merchandise were not subject to levy under said execution, and you should find for the plaintiffs.[64]

§ 1092. **Fraudulent Conveyance—Sale of Goods—Levy on Proceeds Arising from Sale.** If you believe from the evidence that the plaintiffs bought of J. O., as assignee of M. & E. and R. M. & Co., goods and merchandise, and that at the time of such purchase A. & Co. were creditors of M. & E., and that as to them said purchase was

64—Mayer et al. v. Wilkins, 37 Fla. 244, 19 So. 632 (635).

"It was sought by this charge to invoke the established rule in this state, that when real estate is purchased with the money of one person, and the deed taken in the name of another, for the purpose of defrauding the creditors of the former, a trust results in his favor, which can only be reached by resort to equity. The title never having been in the debtor whose money went to pay for the land, it is not subject to levy under an execution at law, and can only be reached in equity. That this is the rule in this state as to real estate is settled in Robinson v. Springfield Co., 21 Fla. 203. Should the same rule prevail as to personal property? Counsel for appellee say that it does not. It is not contended that the facts of the case did not warrant such an instruction, if good, and the question presented is whether it was correct as a legal proposition. We have been impressed with the view that in consequence of the different natures of real and personal property, and the evidence of title required by law as to each, the rule as to land should not be applied to personal property, but we have been unable to find this view sustained by the weight of authority. In discussing the rule as to real estate, Mr. Wait says (Fraud. Convey. par. 57), that 'it may be observed that a purchase of personal property by a debtor in the name of a third party does not exempt it from direct seizure by creditors.' He cites Godding v. Brackett, 34 Me. 27, which sustains the text, though the opinion is short, and contains no discussion on the subject. Some American decisions do not hold to the view announced in reference to real estate, but make real estate purchased with money of one liable to direct seizure under execution, and in some states there are statutes regulating the subject. Maine has a statute on the subject. In dealing with personal property subject to execution, Freeman on Executions (section 136) states the rule to be that: 'Where a debtor has fraudulently conveyed his property, it may be taken on execution against him, because, in favor of his creditors, he is still considered as the owner of the legal as well as of the equitable title. But when he has fraudulently bought property, and had the title taken in the name of another, the circumstances are different, though the object is the same. . . . This legal title cannot be reached by levy of an execution against the debtor, because he has never owned it. The creditor must therefore resort to equity, except in a few states where statutes have been enacted to enable them to reach it at law.' Where the debtor has never had the title of either real or personal property, the statute of Elizabeth, known as the 'statute of Frauds,' does not apply, although the principles of the common law, of which the statute was in part declatory, will enable a creditor to reach the property of his debtor held in trust for him. The following cases hold expressly that if personal property be bought by one person, and the title is, at his instance, conveyed to another by the vendor, creditors of the purchaser cannot reach the property by execution at law, but must seek relief in equity: Gray v. Faris, 7 Yerg. 155; Childs v. Derrick, 1 Yerg. 79; Parris v. Thompson, 1 Jones (N. C.) 57; Garret v. Rhame, 9 Rich. Law (S. C.) 407. This seems to be the prevailing view. Other decisions hold that in the absence of statutory authority an equity in personal property is not subject to be taken on execution at law. Harris v. Alcock, 10 Gill & J. 226, 32 Am. Dec. 158; Rose v. Bevan, 10 Md. 466, 69 Am. Dec. 170."

fraudulent and void, and that said plaintiff sold said goods and merchandise, and, with the proceeds arising from the sale, purchased other goods and merchandise, which were levied on and sold by the defendant under an execution in favor of A. & Co. v. M. & E., then the said levy was illegal, and you should find for plaintiffs.[65]

§ 1093. **Fraudulent Assignment—Mixture of Goods—Levy on Whole Lot When Inseparable.** If you find from the evidence that M. & E. made a fraudulent assignment of the stock of goods to O., as assignee, and that the plaintiffs knew that the assignment was fraudulent, and, with such knowledge, purchased the goods from O., and mingled them with goods purchased by them from other persons, so that they could not be separated therefrom, and that, after such mingling, defendant, as sheriff, and under a writ of execution against M. & E. levied upon the whole, and that the levy was not excessive, he would be justified in such levy, and would not be responsible therefor to the plaintiffs.[66]

§ 1094. **Property in Hands of Vendee—Right of Vendor's Creditors to Attach.** (a) If this property so levied upon and seized, or an

65—Mayer et al. v. Wilkins, 37 Fla. 244, 19 So. 632 (636).

66—Mayer et al. v. Wilkins, 37 Fla. 244, 19 So. 632 (635).

"It was held in Wright v. Skinner, 34 Fla. 453, 16 So. 335, that, in order to justify a forfeiture of goods because of an intermingling of them with the goods of another, two things must concur: First, that the party whose goods are claimed to be forfeited must have fraudulently and wilfully caused the confusion; and, second, the rights of the other party after the confusion must be incapable otherwise of complete protection. In case of fraudulent mixture of goods, if they are capable of identification, it seems there must be a separation of them; but it devolves upon the party whose wrongful act caused the confusion to separate and identify the goods so mingled, and if he cannot do so the loss must fall upon him. In 2 Kent. Comm. 364, it is stated that: 'With respect to the state of a confusion of goods, where those of two persons are so intermixed that they can no longer be distinguished, each of them has an equal interest in the subject, as tenants in common, if the intermixture was by accident. But if it was wilfully made, without mutual consent, then the civil law gave the whole to him who made the intermixture, and compelled him to make satisfaction in damages to the other party for what he had lost. The common law gave the entire property, without any account, to him whose property was originally invaded, and its distinct character destroyed. . . . But this rule is carried no further than necessity requires, and if the goods can be easily distinguished and separated, as articles of furniture, for instance, then no change of property takes place.' The rule is fully discussed in cases cited in note to Jewett v. Dringer, 30 N. J. Eq. 291; 1 Suth. Dam. p. 160, and notes. The property levied on in the present case consisted of goods and merchandise usually kept in a general mercantile business, and, on the facts of the case, we are of the opinion that the charge was not improper. It submitted to the jury the view that if the assignment from M. & E. to O. was fraudulent, and, with knowledge of this fact, plaintiffs bought goods from the assignee, and mingled them with other goods purchased from other parties, so that they could not be separated, the entire stock was liable to be taken on execution against the fraudulent assignors. The purchase of goods from the assignee, with knowledge of the fraudulent purpose for which they were assigned, and the mingling of them with other goods, would place plaintiffs in the position of parties fraudulently mixing goods. Seavy v. Dearborn, 19 N. H. 351."

undivided interest therein, was the property of L. H., as between him and his creditors, then such levy and seizure was lawful, and the plaintiff cannot recover.

(b) If, on the contrary, the property was wholly the property of the plaintiff, as between him and the creditors of L. H., the order of attachment gave the sheriff no authority to levy on the property, and the plaintiff is entitled to recover. It appears in evidence that prior to any transfer of the property to plaintiff, L. H. had an interest therein, as a member of a firm to which it belonged; that such firm made a transfer of the property to the plaintiff; and that, subsequently, L. H. transferred to the plaintiff whatever interest he had therein. By these transfers, the title to the property vested in the plaintiff, as between the parties to the transfers, but whether or not such transfers were valid as to the creditors of L. H. is a different question, involving other considerations, and is one of the principal questions for you to determine.[67]

67—Campbell v. Holland, 22 Neb. 587, 35 N. W. 871 (878).

CHAPTER LII.

FRAUD, FALSE REPRESENTATIONS, ETC.

See Erroneous Instructions, same chapter head, Vol. III.

§ 1095. False Representations Defined—What Constitutes. (a) The court instructs the jury, as a matter of law, that if one person represents to another as true that which he knows to be false, and makes the representation in such a way and under such circumstances as to induce a reasonable man to believe that the matter stated is true, and the representation is meant to be acted upon, and the person to whom the representation is made, believing it to be true, acts upon the faith of it, and suffers damage thereby, this is fraud sufficient to sustain an action for deceit.[1]

(b) A false representation is a false statement or statements made for the purpose of inducing another to part with money or other valuable things, which statements are calculated to influence the person to whom they are made, and which statements do actually deceive the person to whom they are made, and thereby induce him to part with money or other valuable things.[2]

§ 1096. False Representations by Party or His Agent—What Constitutes. As regards the allegations of fraud and misrepresentations charged in this case by the plaintiff in his declaration filed in this case, the court instructs the jury that to entitle the plaintiff to recover damages in this case the jury must believe, from all the evidence, that the alleged misrepresentations were in fact made by the defendant or some of its duly authorized officers and that such representations were false when made; and further the jury must believe, from the evidence, that they were such representations as a man of ordinary prudence would rely upon, and that the plaintiff did in fact rely upon such statements, and was induced thereby to purchase the stock in question in this suit, and to execute the contract complained of in this case, and has thereby been damaged, otherwise your verdict must be for the defendant.[3]

§ 1097. False Representations—Burden of Proof—Reasonable Cause Not Sufficient. (a) The plaintiff must also prove by the preponderance of evidence that such representations were false.

(b) The plaintiff must also prove by the preponderance of evidence that the defendant knew that the representations were untrue.

(c) The petition also alleges that said representations were known

1—Cooley on Torts (3d ed.) 905; Page on Contracts sec. 56. Keith v. Goldstone, 22 Ill. App. 457.

2—McDonald v. Smith et al., 139 Mich. 211, 102 N. W. 668 (673).

3—Hutchinson Furnace & Smoke Cons. Co. v. Lyford, 123 Ill. 300 (302), 13 N. E. 844.

by the defendant, when he made them, to be untrue. To prove the allegations it is not sufficient to show that the defendant had reasonable cause to believe that said representations were untrue. The plaintiff must prove that the defendant knew said representations to be untrue.[4]

§ 1098. **Obtaining Credit upon False Representations—Conspiracy—Commercial Agency—Agent's Liability When Exceeding Authority.** (a) In the present case if you believe from the testimony that W. told X. and Y. that they might use his name upon a paper exactly like a former paper to a Chicago house, and containing the same number of names as guarantors that the former paper contained (if such former paper was ever given) and said X. signed said W.'s name to a different paper, unlike the former paper, for a different amount, and with no other names upon it except W.'s; and if said X. knew at the time that he signed said W.'s name that said letter of credit was for the purpose of getting goods for said Y., and the letter was so used and the goods got upon it,—then X. is liable to the plaintiff for the value of the goods.[5]

(b) You are instructed in this connection that the alleged conspiracy cannot be established on what the said M. might have said, done, or written alone, but there must be other evidence, which may be shown by facts and circumstances showing the conspiracy before what the said M. might have said, done, or written can be considered by you as evidence against said L.[6]

(c) The court instructs the jury that if a merchant furnishes to a mercantile agency, whose business is to obtain and furnish to others statements or reports of the financial condition and standing of business men and persons engaged in trade, a willfully false statement as to his circumstances or pecuniary ability, with intent to obtain a standing and credit to which he knows that he is not justly entitled, and thus to defraud whoever may refer to the agency, and in reliance upon the false information there lodged may extend credit to him, his liability to any party defrauded by these means is the same as if he had made the false representation directly to the party

4—Allison v. Jack, 76 Iowa 205, 40 N. W. 811 (812).

"The falsity of the representations and defendant's knowledge thereof must be established by proof in order to render him liable. Of course such proof must be by the preponderance of the evidence. It is not sufficient to show that defendant had reasonable cause to believe that the statements were untrue. Holmes v. Clark, 10 Iowa 423; Hallam v. Todhunter, 24 Iowa 166; McKown v. Furgason, 47 Iowa 636; Avery v. Chapman, 62 Iowa 147, 17 N. W. 454."

5—Mendenhall v. Stewart, 18 Ind. App. 262, 47 N. E. 943 (946).

"While the complaint charges a conspiracy, yet the cause of action is what is alleged to have been done pursuant to the alleged conspiracy. Obtaining credit for Y, and obtaining for him certain goods, by writing the alleged false letter of credit or guaranty, is the gist of the action."

6—Work v. McCoy, 87 Iowa 217, 54 N. W. 140 (142).

"As it takes two or more to form a conspiracy, the words or acts of one will not establish it. There must be other evidence than that of M, showing that L was a party to the alleged conspiracy. There was no error in this instruction."

injured; the court, therefore, instructs the jury that if they believe from the evidence that the defendant, M., made a willfully and materially false statement as to his circumstances and pecuniary ability with intent to obtain a standing and credit to which he knew that he was not justly entitled, to A. & Co., and that A. & Co. was a mercantile agency of the character above described, and that said false statement was communicated to the plaintiffs, by A. & Co., before they, the plaintiffs, extended to the defendant, credit on account of the goods in question, and that the plaintiffs relied upon said false statement, and were induced thereby to part with the possession of the goods in controversy, then the court instructs the jury, their verdict should be for the plaintiffs.[7]

(d) If the defendant X. wrote the name of W. on this letter of credit as maker, it was his duty to know that it was such a paper as W. had authorized; and if it was not in fact such a one as he authorized, and X. afterward attested it for the purpose of assisting Y. in obtaining credit thereon, both knowing all the facts, both would be liable, though X. may have thought he had authority to execute it. He who uses another's name must be held to know whether he has authority, and if he uses it without authority in fact, to the injury of another, he must be held liable for the injury, no matter what his intention may be in the matter.[8]

§ 1099. Fraud or False Representations Not Presumed—Must be Clearly Proven. (a) You are instructed that you cannot find the defendant falsely or fraudulently made representations to ——- from conjecture or mere inference. Fraud must be clearly proven and the burden of proof is on the plaintiff to establish that fact.[9]

7—Moyer v. Lederer, 50 Ill. App. 94 (96).

"Reliance may be placed upon statements of the financial standing of the person making them, made at different times to different persons, who stand in proper relation to the parties, and the subject-matter of the statements, where the statements are in substantial accord, without violating an instruction given with reference to any one of the particular statements, and the position of the party to whom it is made."

8—Mendenhall v. Stewart, supra.

"If a person, for the fraudulent purpose of inducing another to part with money or property, makes a statement of a fact which is not true, and the person to whom the statement is made relies upon it, and parts with the property, the party making such statement is guilty of fraud, even though he may not have known at the time that the statement was false. Ingalls v. Miller, 121 Ind. 188, 22 N. E. 995; Kirkpatrick v. Reeves, 121 Ind. 280, 22 N. E. 139. The party making the statement is bound to know whether it is true or not, and it is not material what his intentions may have been at the time."

9—Shaw v. Gilbert, 111 Wis. 165, 86 N. W. 188 (195).

"The rule is general and elementary that while fraud, and especially the intent, may be inferred from acts, conduct, and circumstances, yet, as the assertion of fraud involves a charge of moral turpitude, such inference is not to be lightly drawn from doubtful and ambiguous circumstances, nor because of mere suspicion or conjecture. The field of inference is a dangerous one, because the most innocent circumstances can, by juxtaposition with others as presented by counsel, often be colored with suspicion, which, aided by sympathy for the suffering victim of alleged deceit, may often hurry the jury across the line between

(b) Fraud is never to be presumed, but must be affirmatively proven by the party alleging the same. The law presumes that all men are fair and honest—that their dealings are in good faith, and without intention to disturb, cheat, hinder, delay or defraud others; where a transaction called in question is equally capable of two constructions—one that is fair and honest and one that is dishonest—then the law is that the fair and honest construction must prevail and the transaction called in question must be presumed to be fair and honest.[10]

(c) The court instructs the jury, that while fraud is not to be presumed without proof, yet fraud, like any other fact, may be proved by proving circumstances from which the inference of fraud is natural and irresistible; and if such circumstances are proved, and they are of such a character as to produce, in the mind of the jury a conviction of the fact of fraud, then it must be considered that fraud is proved.[11]

§ 1100. Every False Affirmation not a Fraud—What the Jury Must Consider—What Must Be Proved. (a) You are instructed, that every false affirmation does not amount to a fraud. If, by an ordinary degree of caution, the party complaining could have ascertained the falsity of the representations complained of, then such party is not entitled to a verdict; and in this case, to entitle the plaintiff to a verdict, you must believe, from the evidence, not only that the representations complained of were made, but also that they were made under circumstances calculated to deceive a person acting with reasonable and ordinary prudence and caution; and in determining this question, the jury should consider all the circumstances under which the alleged representations appear, from the evidence, to have been made, and whether, under the circumstances the representations were such as a person of common and ordinary prudence would or should have relied upon or such as would be likely to mislead such a person.[12]

(b) That the plaintiff is not entitled to recover in this case unless you believe, from the evidence, that the defendant made the representations alleged in the declaration; that such representations were false; that defendant knew they were false, or had no apparently

mere conjecture and legitimate inference, unless restrained by cautionary instructions to sane and careful watchfulness over their mental steps. Juries should always be instructed that they cannot draw an inference of fraud except upon clear and satisfactory evidence legitimately pointing thereto 1 Jones Ev. par. 190."

10—Schroeder v. Walsh, 120 Ill. 410, 11 N. E. 70; Hill v. Reifsnider, 46 Md. 555; Tompkins v. Nichols, 53 Ala. 197.

11—Watkins v. Wallace, 19 Mich. 57; Daniel v. Baca, 2 Cal. 326; Waddingham v. Loker, 44 Mo. 132; Strauss v. Kranert, 56 Ill. 254; Bumpus v. Bumpus, 59 Mich. 95, 26 N. W. 410; Newell v. Randall, 32 Minn. 171, 19 N. W. 972, 50 Am. Rep. 562.

12—Eames v. Morgan, 37 Ill. 260; Antle v. Sexton, 137 Ill. 410, aff'g 32 Ill. App. 437, 27 N. E. 691; Com. Nat. Bk. v. Pirie, 27 C. C. A. 171, 82 Fed. 799.

good reason to believe they were true; that they were made with intent to defraud the plaintiff; that plaintiff was induced thereby to make the trade in question, and has sustained damage by means thereof.[13]

§ 1101. **All False Representations Need not be Proved.** To entitle the plaintiff to recover in this case, it is not necessary that he should show that all the representations charged were made by the defendant, or, if made, that they were all untrue; it is sufficient if the jury believe, from the evidence, that some of the representations were made as charged, that they were untrue and known to be so at the time by the defendant, or that he had no good reason to suppose them to be true, that they were calculated to deceive an ordinarily cautious person, and were intended by the defendant to deceive and defraud the plaintiff—that without such false and fraudulent representations the property would not have been delivered (or the credit given) and that the plaintiff has been damaged by the fraudulent acts of the defendant.[14]

§ 1102. **Expression of Opinion—Bragging—Bad or Losing Bargain.** (a) The jury are instructed, that a purchaser cannot maintain an action against his vendor for false statements in regard to the value of the property purchased, or its good qualities, or the price he has been offered for it.[15]

(b) You are instructed, that when parties are negotiating a trade for property, which there is an opportunity for examining, each has a right to exalt the value of his own property to the highest point the other party's credulity will bear, and depreciate the value of the other's property. Such boastful assertions, or highly exaggerated descriptions, do not amount to fraudulent misrepresentation or deceit. In such case, the parties are upon equal ground, and their own judgments must be their guide in coming to conclusions.[16]

(c) That when a party, capable of taking care of his own interests, makes a bad or losing bargain, the law will not assist him, unless deceit has been practiced, against which ordinary care could not protect him.[17]

§ 1103. **Misrepresentation of Value of Property—Distinguishing Opinion From Misrepresentation.** (a) The jury are instructed that when one person states to another his opinion as to the value of any property, merely as his opinion, and not as a fact that he knows to

13—2 Cooley on Torts (3d ed.) 949; Eames v. Morgan, 37 Ill. 260; McKown v. Furgason, 47 Ia. 636; Sukeforth v. Lord, 87 Cal. 399, 25 Pac. 497.

14—Smith v. State, 55 Miss. 513; Beasley v. State, 59 Ala. 20.

15—Dillman v. Nadelhoffer, 19 Ill. App. 375; Ellis v. Andrews, 56 N. Y. 83, 15 Am. Rep. 379.

16—2 Cooley on Torts (3d ed.) 921; Payne v. Smith, 20 Ga. 654; Bristol v. Braidwood, 28 Mich. 191; Miller v. Craig, 36 Ill. 109; Reed v. Sidener, 32 Ind. 373; Ellis v. Andrews, 56 N. Y. 83; Bante v. Savage, 12 Nev. 151.

17—Noetling v. Wright, 72 Ill. 390; Reel v. Ewing, 4 Mo. App. 569; Livingston v. Strong, 107 U. 295.

be true, then the person to whom such opinion is stated in this manner has no right to rely on such opinion, but must exercise his own judgment, etc.[18]

(b) All statements by a vendor of the value of property sold, are not necessarily matters of opinion; if the vendor, knowing them to be untrue, makes them with the intention of misleading the purchaser, and of inducing him to forbear making inquiries as to the value of the property; and if the vendee has not equal means of knowledge, and is induced by the statements of the vendor to forbear making inquiries which he otherwise would have made, and, relying on such statements, is mislead, to his injury, he may avoid the contract or recover damages for the injury.[19]

(c) The difference between the actual value of the land conveyed to plaintiff, and what would have been its value if it had been such land as represented and shown the plaintiff, with 6 per cent interest from date of transfer to time of trial is the plaintiff's measure of damages.[20]

§ 1104. **Mere Silence is not Fraud, When.** That mere silence or a failure to communicate facts within the seller's knowledge, is not such a fraud as will avoid a contract, or render the seller liable. To have that effect, there must be some concealment, as by withholding information when asked, or using some trick or device to mislead the purchaser. The seller may let the purchaser cheat himself, if he sees fit to do so, but he must not assist him, even to cheat himself.[21]

§ 1105. **Representation as to the Law.** That a representation as to what the law will or will not permit to be done, or a representation regarding the legal rights of a party, is one upon which the party to whom it is made, has no right to rely; and if he does so, it is his own folly, and he cannot ask the law to relieve him from its consequences.[22]

§ 1106. **Elements of Misrepresentations—What Must be Proved.** Before plaintiff can recover in this action, it must establish by a preponderance of the evidence, as to one or all of its first three claims as explained in the foregoing instruction: First, that the representation or representations as charged in the petition were

18—For a very extensive, if not an exhaustive, digest of the cases on this question, see the note to Hedin v. Institute, 62 Minn. 146, 64 N. W. 158, 35 L. R. A. 417, 54 Am. St. Rep. 628. Byers v. Maxwell, 22 Texas Civil App. 269, 54 S. W. 789 (791).

19—Simar v. Canaday, 53 N. Y. 298; Nowlen v. Snow, 40 Mich. 699; Bacon v. Frisbee, 15 Hun (N. Y.) 26.

20—Connors v. Chingren, 111 Iowa 437, 82 N. W. 934 (937).

"It was good as far as it went, and, if defendant desired an instruction to the effect that the actual value was the price fixed by the parties, he should have asked it. Cox v. Allen, 91 Iowa 468, 59 N. W. 335; Howes v. Axtell, 74 Iowa 401, 37 N. W. 974."

21—Kohl v. Lindley, 39 Ill. 195; Mooney v. Miller, 102 Mass. 217; Jordan v. Pickett, 78 Ala. 331.

22—Fish v. Clelland, 33 Ill. 238; Townsend v. Cowles, 31 Ala. 428; People v. Supervisors, etc., 27 Cal. 655; Rogers v. Place, 29 Ind. 577; Upton v. Tribilcock, 91 U. S. Rep. 45-49; Am. Ins. Co. v. Capps, 4 Mo. App. 571; Champion v. Woods, 79 Cal. 17, 21 Pac. 534, 12 Am. St. Rep. 126.

made by H. to A.; second, that the representations were false; third, that A. believed the representations to be true; fourth, that A. in making the purchase, relied upon the representations, and was only induced to make the purchase because of the same; and fifth, that, for the reason the cattle were not as represented, plaintiff has suffered damages. And if you believe from the evidence that plaintiff has made out his case, as herein explained, as to part, but not as to all three, of his said claims for damages, then you will allow him damages accordingly, measured as hereinafter explained but, if it has not made out its case as to either of said three claims, then you will find for the defendant.[23]

§ 1107. **Representations Must be of the Past or Present, Not of Future Events.** The jury are instructed, that before a party can annul or treat a contract as void, by reason of alleged false or fraudulent representations used in procuring it to be made, it must appear, from the evidence, that the alleged false or fraudulent representations were made regarding something which has already transpired, or was then alleged to exist. No statement of one's opinions as to what will or will not happen, or exist, in the future, can affect a contract or render it void. Every person, in making a contract, is at liberty to speculate or express opinions as to future events, and he cannot be held to answer for their truth or falsity.[24]

§ 1108. **Injury Must be Shown.** (a) The jury are instructed, that in order that the defendant may avail himself of the defense of fraud, set up in the pleas in this case, the jury must believe, from the evidence, not only that the statements and representations set forth in said pleas were made, but also that such statements and representations were false—that they were made with intent to deceive and defraud the defendant—that the defendant was induced thereby to enter into the contract, and that he has sustained damage by reason thereof.[25]

(b) The court instructs you that a mere fraudulent representation is not of itself actionable. To entitle the plaintiff to recover, he must not only show, by preponderance of evidence, that the representations were made, and that they were false and fraudulent, but he must also show affirmatively, by a preponderance of evidence, that he relied thereon and that he has been injured thereby—that he is in some way placed in a worse condition than he would have been had the statements been true.[26]

§ 1109. **Knowledge of Falsity and Intent Must Appear from the Evidence—Actual Knowledge Not Essential.** (a) The jury are in-

23—Hitchcock et al. v. Gothenburg Water P. & Irrigation Co., 41 Neb. 620, 95 N. W. 638 (639).

24—Payne v. Smith, 20 Ga. 654; Reed v. Sidener, 32 Ind. 373; Bristol v. Braidwood, 28 Mich. 191; Tuck v. Downing, 76 Ill. 71.

25—Mitchell v. Deeds, 49 Ill. 410; Cole v. Miller, 60 Ind. 463; Marshall v. Hubbard, 117 U. S. 415, 6 Sup. Court 806; Holton v. Noble, 83 Cal. 7, 23 Pac. 58.

26—Bartlett v. Blaine, 83 Ill. 25; Skowhegan First Nat. Bk. v. Maxfield, 83 Me. 576, 22 Atl. 479.

structed, that while fraud vitiates every contract, every false affirmation does not amount to fraud. To constitute fraud, a knowledge of the falsity of the representation must rest with the party making it, and the representation must be made with the intention that the other party shall act upon it, and it must also appear that the other party did act upon the representation, to his injury.[27]

(b) The court instructs the jury, that any willful misrepresentation of a material fact, made with a design to deceive another, and to induce him to enter into a trade he would not otherwise make, will enable the party who has been over-reached to annul the contract; and it makes no difference whether the party making the misrepresentation knew it to be false or whether he was ignorant of the fact stated; provided, the matter stated was material, and the party making the statement stated it as true, when, in fact, he had no apparently good reason for believing it to be true, and when the other party, under the circumstances shown by the evidence, was reasonably justified in relying upon the statement, and did rely upon it in making the trade, and was deceived and injured thereby.[28]

(c) The court instructs the jury that the fact, if such be the fact, that the defendant may have been informed by some third party, or may have believed that said two cars had been sold, is no defense to this action so far as actual damages is concerned, and the jury are instructed to disregard any and all evidence of those facts in determining plaintiff's right to recover actual damages.[29]

§ 1110. **Misrepresentation may be Fraudulent Even if Not Known to be Untrue.** (a) The court instructs the jury that material representations, made by a vendor, of matters assumed by him

27—Walker v. Hough, 59 Ill. 375; Dwight v. Chase, 3 Ill. App. 67; Davis v. Heard, 44 Miss. 50; Rimer v. Dugan, 39 Miss. 477, 77 Am. Dec. 687.

28—2 Cooley on Torts (3d ed.) 953; Beebe v. Knapp, 28 Mich. 53, 76; Allen v. Hart, 72 Ill. 104; Litchfield v. Hutchinson, 117 Mass. 195; Hutchinson v. Gorman, 71 Ark. 305, 73 S. W. 793.

29—Serrano v. Miller & Teasdale Com. Co., — Mo. App. —, 93 S. W. 811 (812).

"When a party makes a representation of a material fact as of his own knowledge, when in truth he has no knowledge whatever of the subject either of its truth or its falsity, in such case, inasmuch as the utterer has no knowledge on the subject whatever, it would be impossible to establish a scienter by proof showing that he knew the representation to be false, for the reason that no showing pro or con on the subject could be made. Therefore the law will constructively supply the scienter because of the reckless conduct of the utterer for the very good reason that a positive statement of fact implies knowledge of such fact, and, if the party who makes it has no knowledge upon the subject, he is telling scienter what is untrue—he is affirming his knowledge, when in truth he has no knowledge to affirm. Hamlin v. Abell, 120 Mo. 188, 25 S. W. 516; Caldwell v. Henry, 76 Mo. 254; Dulaney v. Rogers, 64 Mo. 201; Dunn v. White, 63 Mo. 181; Lovelace v. Suter, 93 Mo. App. 429, 67 S. W. 737; Paretti v. Rebenack, 81 Mo. App. 494; Knappen v. Freeman, 47 Minn. 491; 50 N. W. 533; Fisher v. Mellen, 103 Mass. 503; Montreal River Lumber Co. v. Mihills, 80 Wis. 540, 50 N. W. 507; Joliffe v. Baker, 11 Q. B. Div. 225; Derry v. Peek, L. R. 14 App. Cases 337; Rothschild v. Mack, 115 N. Y. 1, 21 N. E. 726; Benjamin on Sales (Bennett's Notes) (6th ed.) 449."

to be within his personal knowledge, are false and fraudulent, in a legal sense, if made with intent to deceive the vendee, and if they are untrue, and are relied upon by the vendee in making the purchase, to his damage, although the vendor did not know them to be untrue.[30]

(b) The law is, if a person recklessly makes a false representation of the truth of a matter of which he knows nothing for the fraudulent purpose of inducing another to rely upon his statements, and to make a contract or do any act to his prejudice, and the other party does so rely and act upon it, and thereby suffers an injury, the party making the representation is liable in an action for fraud and deceit, as much so as if he had known the statement to be false at the time it was made.[31]

§ 1111. **Purchaser Knowing Himself Insolvent.** The jury are instructed, that although they may believe, from the evidence, that the defendant, at the time he purchased the goods in question, was insolvent and knew himself to be so, and did not disclose that fact to the person of whom he purchased the goods, still the defendant would not be guilty of fraud so as to vitiate the contract of sale; provided, the jury further believe, from the evidence, that he then intended to pay for the goods, and had reasonable grounds for believing that he would be able to do so.[32]

§ 1112. **Purchase with Intent not to Pay.** The jury are instructed, as a matter of law, that in order to render a purchase of property fraudulent, as between the parties, it is not necessary that there should have been any false representations made by the purchaser to effect his purpose. If the jury believe, from the evidence, and from the facts and circumstances proved on the trial, that the purchase in question was made by the purchaser with the intention not to pay for the property, then the transaction was fraudulent and void, and vested no title in the purchaser.[33]

§ 1113. **Defect Obvious and Visible.** The jury are further instructed, that if they believe, from the evidence, that the defect complained of was of such a nature and size, and so obvious and visible to the senses that it could have been discovered by the exercise of ordinary care and diligence, in looking at and examining the horse, then the defendant is not liable in this suit, unless the jury further believe, from the evidence, that the defendant used

30—Ind. P. & C. Rd. Co. v. Tyng, 63 N. Y. 653; 1 Page on Contracts sec. 57.

31—Beebe v. Knapp, 28 Mich. 53; Cooper v. Schlesinger, 111 U. S. 148, 4 S. Ct. 360; Hindman v. First Nat. Bank, 50 C. C. A. 623, 112 Fed. 931, 57 L. R. A. 108.

32—Talcott v. Henderson, 31 Ohio St. 162; Diggs v. Denney, 86 Md. 116, 37 Atl. 1037. Where the purchaser is insolvent and does not intend to pay for the goods, seller can disaffirm. Maxwell v. Brown Shoe Co., 114 Ala. 304, 21 So. 1009.

33—2 Cooley on Torts (3d ed.) 909; Bowen v. Schuler, 41 Ill. 192; Shipman v. Seymour, 4 Mich. 274; Flower v. Farewell, 18 Ill. App. 254; McKenzie v. Rothschild, 119 Ala. 419, 24 So. 716.

some artifice or trick to prevent the plaintiff from seeing or discovering the defect.[34]

§ 1114. Purchaser Must Exercise Reasonable Caution. (a) You are instructed, that the law imposes upon one purchasing personal property, that degree of caution and diligence in ascertaining the title of his vendor, which ordinarily prudent business men usually exercise under like circumstances and it charges him with constructive notice of such facts only, as by the exercise of such caution and diligence he would probably have discovered.[35]

(b) A party must always exercise due diligence to protect himself from fraud. By "due diligence" is meant such diligence as ordinarily prudent men would use; and he must also continue to use due diligence to protect his rights all through, and, if due diligence requires that he should make an effort to find out whether he is defrauded, he must use that diligence; and whether he did is a question of fact for you. It does not necessarily follow, because P. did not erect the buildings, or start to, in the spring of ———, that the defendant was bound to know that he had not bought the lots, or bound himself to erect them. But you may take that into account as a circumstance tending to open the eyes of the defendant and cause him to make inquiry as to whether P. had made the purchase. And a man must exercise ordinary diligence to protect himself from fraud in making contracts, and by "ordinary diligence" is meant such care and diligence as the great majority of mankind, or ordinarily prudent men, would exercise under like circumstances. And whether such ordinary care and diligence were in fact exercised is a question of fact for the jury, under all the circumstances disclosed by the evidence in the case. So a party desiring to rescind a contract which he has been induced to enter into by fraud must, within a reasonable time after discovering the fraud, so signify to the other party, and this he may do by an ordinary notice. And what is a reasonable time is a question of fact for the jury, to be determined by the evidence in the case, and all the attending circumstances disclosed by the evidence.[36]

§ 1115. False Representations Made But Not Relied On—Information Sought Elsewhere—No Recovery. If the defendant made false and fraudulent representations or statements, and the plaintiff did not rely on them, but sought and obtained information as to the facts from other sources, and then, on his own judgment, concluded to enter into the contract mentioned in the complaint,

34—Ward v. Borkenhagen, 50 Wis. 459, 7 N. W. 340; Holst v. Stewart, 161 Mass. 516, 37 N. E. 755, 42 Am. St. Rep. 442.

35—Cochran v. Stewart, 21 Minn. 435; Rockafellow v. Baker, 41 Pa. St. 319; Kaiser v. Nummedor, 120 Wis. 234, 97 N. W. 932.

36—South Milwaukee Boul. Heights Co. v. Harte, 95 Wis. 592, 70 N. W. 821 (822).

and takes his chances as to what he should get by reason thereof, then he cannot recover in this action on that issue.[37]

§ 1116. Sales Procured by Fraud—Replevin—Purchase Money Notes. (a) If a purchase of goods is effected by means of false and fraudulent representations on the part of the purchaser, known by him to be false, and which are relied upon by the seller, and but for which he would not have made the sale, then the seller does not, as against the purchaser, lose his title to the goods, and he may bring trover or replevin for them against the purchaser, without first making a demand for them.[38]

(b) And in such a case, if the purchaser has given a note or notes for the price of the goods, the seller may bring his suit without making a previous tender of the notes; provided, the notes are produced at the trial to be surrendered to the defendant.[39]

§ 1117. Innocent Purchaser from Fraudulent Vendee. The court instructs the jury, that when a person who has purchased goods and obtained possession of them by false and fraudulent representations, sells them to an innocent purchaser for value before they are reclaimed by the vendor, such innocent purchaser will acquire a valid title to the goods.[40]

§ 1118. Innocent Vendee from Fraudulent Vendor—Goods Taken in Payment of Debt. If you believe, from the evidence, that the defendant bought the goods in controversy from M. in good faith, in payment, or in part payment, of a debt which M. owed defendant, and without any knowledge or notice of the means by which M. obtained them from the plaintiff, then, on the question of ownership of the goods, you should find for the defendant, even though you should further find, from the evidence, that M. had obtained the goods from the plaintiff by means of false and fraudulent representations, as alleged.[41]

§ 1119. Exorbitant Price as Proof of Fraud—Inadequacy of Purchase Price. (a) It is material in this case that you shall consider the question as to the value of the property sold and purchased at the time of the sale with a view of determining the truth as to the issue submitted. If it should appear that the property in question

37—Craig v. Hamilton, 118 Ind. 565, 21 N. E. 315.

"If the appellee did not rely upon the representations made to him by the appellant, but relied upon information obtained from other sources, and upon his own judgment, he cannot be heard to claim that he was defrauded by the appellant. To constitute fraud it is necessary that the party alleging it should show that he relied upon the representations alleged to be false. Pattison v. Jenkins, 33 Ind. 87; Hoffa v. Hoffman, id. 172; Meyer v. Yesser, 32 Ind. 294; Bowman v. Carithers, 40 Ind. 90; Hagee v. Grossman, 31 Ind. 223. The court erred, we think, in refusing to give this instruction."

38—Coghill v. Boring, 15 Cal. 213; Thurston v. Blanchard, 22 Pick. 18; Nichols v. Michael, 23 N. Y. 264.

39—Ibid.

40—Cochran v. Stewart, 21 Minn. 435; Ohio, etc., Rd. Co. v. Kerr, 49 Ill. 458; 2 Hill. Torts 143; Hart v. Church, 126 Cal. 471, 58 Pac. 910, 77 Am. St. 195.

41—Butters v. Haughwout, 42

was sold to Mrs. McE. at a grossly exorbitant price,—that is greatly in excess of its real value,—then this is a circumstance to which you will look with a view of determining the question whether the sale was fraudulent or not; but in order that the price to be paid can be so considered it must appear that the amount was grossly exorbitant.[42]

(b) The court instructs the jury, for the plaintiff, that the sale and purchase of goods for a less sum than the actual cash value is not fraudulent, and although you may believe, from the evidence, that R. purchased the goods for less than their real value from F., that, of itself, is not evidence of fraud or circumvention on the part of R., and if you believe R. acted in good faith, you should find for the plaintiff.[43]

§ 1120. Party Defrauding Liable Whether He Profited or Not. When two or more persons combine and conspire by false representation or other fraudulent acts to cheat and defraud another, all of said persons participating to aid said fraud are liable to the person defrauded, whether they received any benefit from the fraud or not.[44]

§ 1121. Misrepresentations of Lessee Concerning Rent Paid—Sub-Lessee Paying Excessive Share. If the jury find that the defendant, either in person or by agent, falsely represented to plaintiff that she was paying $—— per year as rent for the store; that said representation was a material one that plaintiff had a right to rely upon; and did all the time rely thereon, in the exercise of reasonable care on her part; and that by reason of such reliance, and believing the representations to be true, she was deceived, and thereby induced to pay to defendant certain sums of money as plaintiff's proper share of rent in excess of that which was originally due from her according to the facts as they existed, when in truth said defendant was not paying the amount of rent as aforesaid, to wit $——, but a smaller amount,—then the plaintiff may recover the excess of money so paid under such mistake of fact.[45]

§ 1122. False Representations as to Soundness of Horse—Jury to Use Common Sense. You are the exclusive judges of fact, of the

Ill. 18; Starr v. Dow, — Neb. —, 108 N. W. 1065. (On this point the decisions in different states are not uniform.)

42—McElya v. Hill et ux; Hill et ux v. McElya, 105 Tenn. 319, 59 S. W. 1025 (1027).

43—Mathews v. Reinhardt, 149 Ill. 635 (645), 37 N. E. 85.

"The general rule is, that mere inadequacy of price is not of itself a ground for setting aside a transfer of goods as fraudulent. Yet the inadequacy may be so great as to amount, of itself, to evidence of fraud. But the inadequacy of which the instruction treats does not apply to the price paid by F to the insolvent debtor, but to the price paid by the plaintiff, or rather by the plaintiff's father, to F. Clearly, if F paid P an adequate price, the fact that he sold them to R for less than their actual value has of itself no tendency to charge the purchaser from him with any fraud of which the defendants in this suit can take advantage."

44—Mendenhall v. Stewart, 18 Ind. App. 262, 47 N. E. 943 (946).

45—Du Souchet v. Dutcher, 113 Ind. 249, 15 N. E. 459 (462).

bearing and weight of the evidence, and of the credibility of the witnesses. The charge against the defendant being one of fraud, ought not to be lightly inferred; still, it need not be proved by direct or positive evidence. If that were the case, frauds could scarcely ever be proved. You may infer fraud from the evidence and circumstances shown in the case. On this point you must be guided by your own judgment, and from all the evidence given in the cause, and matters and circumstances shown thereby. You must find whether or not the defendant is guilty of the fraudulent conduct aforesaid. The burden is on the plaintiff to prove the fraudulent charge alleged by a preponderance of the evidence. If you find for the plaintiff, you will assess his damages at a sum equal to the difference between what the horse was in fact worth and what he would have been worth if he had been sound as represented, to which you may add interest from the time this action was brought.[46]

§ 1123. **Money Paid Out Through Fraud or Wrong of Defendant —Interest On.** The jury are further instructed by the court that if they find, from the evidence, that the defendant is guilty under any of the issues herein, and that the plaintiff was required to and did pay out money through the wrong or fraud of the defendant, it will be the duty of the jury to find, from the evidence, the amount of money so paid out by the plaintiff, and the date when the same was so paid, and the jury will include in their verdict such amount so paid, if they find it was paid out through the fraud or the wrongful acts of the defendant, and also include in the verdict interest on such sum so found to have been so paid at the rate of five per

46—Timmis v. Wade, 5 Ind. App. 139, 31 N. E. 827 (829).

"Counsel insists that the portion of this charge which directs the jury that they must be guided by their own judgment brings it within the rule laid down in Densmore v. State, 67 Ind. 306.

"In that case, the court, among other things, instructed the jury that in making up their verdict what is called 'common sense' is perhaps the juror's best guide. The supreme court held this to be erroneous for the reason that 'common sense' was not 'a better guide to them in the discharge of their duties than the rules of law' in determining the guilt or innocence of the defendant. Also for the further reason that the term 'common sense' was indefinite in its meaning; that each juror might have his own standard in its application, and thus produce endless conflict. A similar ruling was made in the case of Wright v. State, 69 Ind. 163, 35 Am. Rep. 212. In this last case, however, the court makes the following statement: 'If the court had expressly limited its commendation of common sense as a guide to so much of the law as had reference to the value and weight of the evidence only we might not have seen any objection to that part of the instruction.' The ruling in that case does not apply with any force to the case at bar. Taking the word 'judgment' as used by the court in the instruction complained of to mean a decision resulting from the mental process of reasoning, or that faculty of the mind by which a person is enabled, by a comparison of ideas, or an examination of facts, to arrive at a just conclusion in reaching for the truth, we are unable to understand how the jury could have been misled by the instruction."

cent. per annum from the date of such payment by the plaintiff until paid.[47]

§ 1124. Misappropriation of Funds—Liability. (a) The court instructs the jury that this is a suit brought by N., plaintiff, against R., defendant, to recover certain money, which plaintiff claims to have furnished said defendant to be used in buying a stock of goods for the joint ownership of said plaintiff and defendant, and which has not been returned to her, and which was not used for the purchase of such goods, and if, from the preponderance of evidence, the jury find that such is the fact, then they will render a verdict for the plaintiff, and assess her damages at such sum of money as, from the evidence, they find she so furnished the defendant, together with five per cent. interest thereon from such date as they may find that the evidence, the defendant appropriated the same to his own use, if from the evidence they find he did so appropriate it, less any payment or payments that they find from the evidence, may have been made thereon by said defendant.

(b) The court further instructs the jury that, if the money sued for was the property of the plaintiff, N., and known to be such by the defendant, R., when he received the same, and was received by him for the purpose of buying a certain stock of goods for the joint use and ownership of plaintiff and defendant as partners, and that he did not buy such goods nor repay said money to plaintiff, but used the same without plaintiff's consent to pay off notes and accounts owed to him by plaintiff's husband, then the plaintiff is entitled to recover in this action, and the jury will so find.

(c) And the court instructs the jury that, if they believe from the evidence that the money furnished in this case to the defendant belonged to the plaintiff, and was evidenced by the draft offered in evidence herein, and that said draft was made payable to the order of the plaintiff and by her endorsement on the back thereof she directed the same to be paid to the order of the defendant, and that defendant received the same, knowing it to be the money of plaintiff, and that he had agreed with her to use it in the purchase of property for the joint benefit of defendant and Mrs. N., and that he converted said draft into cash and retained the same, then the plaintiff is entitled to recover in this case, and the jury will so find.[48]

§ 1125. Allowing Property to Remain in the Possession of An-

47—Pungs v. Am. Brake Beam Co., 102 Ill. App. 76 (86), aff'd 200 Ill. 306, 65 N. E. 645.

"Claim is made that the court erred in giving the above instruction in that it permits the jury to allow interest in an action of tort. We think that the instruction as to interest does not allow the jury to allow interest on the item of defective brake beams, but only on moneys actually paid by the appellee because of the wrongful acts of the appellant. And we think it apparent when the several amounts which we have held the jury were justified in including in the verdict are added to the interest at five per cent per annum, the amount of the verdict is not too large. That interest is allowable on the moneys paid out we think was proper under the statute. (Chap. 74, sec. 2; title: Interest)."

48—Redfern v. McNaul, 79 Ill. App.

other so that he Obtains Credit on the Faith of it is Not Necessarily an Indication of Fraud. If the claimant permitted the defendants to use the property as their own, hold themselves out as the owners of the same, and they obtained credit upon faith of it, then you could use that testimony to determine whether or not it was the property of the claimant or the property of the defendants, and to determine whether or no the claim is one of good faith.[49]

§ 1126. Accepting Draft Upon False Representations—Drawing Check Without Funds. (a) If you find from the evidence that the plaintiffs accepted the two drafts sued on, without being at the time informed by the defendant bank that cattle would be shipped to meet said drafts to plaintiffs, and relying thereon, the plaintiffs cannot recover in this action against the bank. If, on the other hand, you find from the evidence that at the time plaintiffs accepted the two drafts in question, defendant bank had informed plaintiffs by telephone that cattle would be shipped to meet said drafts, and that plaintiffs relied on said information, and by reason thereof accepted said drafts, and you further find that said cattle were not shipped, and that plaintiffs paid said drafts upon said acceptance, then, if you so find from the evidence, the plaintiffs would be entitled to recover in this case from said bank.

(b) If you believe from the evidence that the money represented in the two drafts paid by B. & F. was first furnished by the defendant bank to S. to buy cattle, and then drawn for by said bank on B. & F., and paid by them to said bank, and you further believe from the evidence that it was the intention of S. that the cattle so purchased should be shipped to the said B. & F. to meet said drafts, and that said bank so understood at the time it drew said drafts, and you further find that said cattle were afterwards diverted to Chicago, with the knowledge of said bank, and said bank again received the money so advanced by it out of the proceeds of the sale in Chicago, said bank would be liable for the money so obtained from B. & F., and your verdict, if you find as above stated, should be for the plaintiffs for the amount of said drafts, with interest.[50]

232 (234), aff'd 179 Ill. 203, 53 N. E. 569.

"We think, after full consideration of counsel's arguments, that there is nothing misleading or calculated to mislead the jury in the instructions; that the second instruction is not argumentative, and that the ending of the second and third instructions was not improper. It was the duty of the jury, if the facts as stated in the second and third instructions were established by the evidence, to find for the plaintiff and there was no error in directing them so to find. Plano Mfg. Co. v. Parmenter, 39 Ill. App. 270; St. L. A. & T. H. R. R. Co. v. Reagan, 52 Ill. App. 496."

49—Giannone v. Fleetwood et al., 93 Ga. 491, 21 S. E. 76.

"The claimant allowed the furniture to stay in the shop to be used, but, if it belonged to him, it was not holding it out as the property of the occupants, or as a basis for giving them credit, nor was it granting to them any permission, express or implied, so to hold it out. Moreover, there was no evidence that credit was extended to the occupants on the faith of this furniture."

50—Neb. Nat. Bank v. Burke et

(c) The jury are instructed, that a person who draws a check or order upon a person in whose hands he has no funds, and who he has no reason to believe will honor the check or order, is guilty of fraud; and if he thereby acquires possession of property, the owner may repudiate the sale, and bring trover or replevin for the property so obtained.[51]

§ 1127. **Fraud Renders Sale Not Void, but Voidable.** Fraud, in the sale or purchase of personal property, does not render the transaction void, but only voidable, at the option of the party defrauded. The vendor, when defrauded, may either avoid the contract, or he may ratify it, while the property remains in the hands of the purchaser; but after the property has passed into the hands of a bona fide purchaser from the fraudulent vendee, the seller cannot reclaim the property.[52]

§ 1128. **Right to Affirm or Disaffirm—Return of Property, When.** The court instructs the jury that the law is, that where a person is induced to part with his property, under a contract procured by fraud, on discovering the fraud he may avoid the contract and claim a return of the property. He has his election to affirm or disaffirm the contract, but if he disaffirms it, he must do so at the earliest practicable moment after the discovery of the fraud.[53]

§ 1129. **Rescission — Promptness — Entire Contract — Return of Consideration.** (a) Where a party undertakes to rescind the contract of sale, on the ground of the fraud of the other party, he must, as soon as the fraud is discovered, take all reasonable measures to rescind it; and if he undertakes to rescind the contract, he must rescind the whole of it, and if he has received any money, or other valuable thing under the contract, he must return, or offer to return the same, so as to place both parties in the same condition that they were in before the sale.[54]

(b) The court instructs the jury that a party who seeks to rescind a sale or contract for fraud must act with vigilance and promptness, and it is his duty to disaffirm within a reasonable time after the discovery of the fraud; and if H., after he had discovered that he was in anywise defrauded, kept the property which he had received, and treated it as his own by exercising acts of ownership

al., 44 Neb. 234, 62 N. W. 452 (454). "These grounds, upon which the defendant bank might be held liable, were distinct, it is true, but each was consistent with the other, and either presented a sufficient reason for holding the bank liable. There existed no reason for mingling these independent grounds of liability in the same instruction."

51—Mathews v. Cowan, 59 Ill. 341.

52—Mich., etc., Rd. Co. v. Phillips, 60 Ill. 190; Shappirio v. Goldberg, 192 U. S. 232, 24 S. Ct. 259; Kearney v. Ry. Co., 97 Ia. 719, 66 N. W. 1059, 59 Am. St. 434.

53—Cochran v. Stewart, 21 Minn. 435; Hall v. Fullerton, 69 Ill. 448; Wright v. Pelt, 26 Mich. 213; Pearsoll v. Chapin, 44 Penn. St. 9.

54—Babcock v. Case, 61 Penn. St. 427; Jewett v. Petit, 4 Mich. 508; Coghill v. Boring, 15 Cal. 213; Och v. Ry. Co., 120 Mo. 27, 31 S. W. 962, 36 L. R. A. 442; Petty v. Ry. Co., 109 Ga. 666, 35 S. E. 82; Grymes v. Sanders, 93 U. S. 55.

over it, and afterward offered it for sale, that such acts would amount to acquiescence, and to find for defendants.[55]

§ 1130. **Rescission—Rights of Vendor as Against Attaching or Execution Creditor.** The court instructs the jury, as a matter of law, that where a party sells goods and delivers them, under circumstances which would authorize him to rescind the sale as against the purchaser, as explained in these instructions, he will have the same right, as against an attaching or execution creditor of the purchaser.[56]

§ 1131. **Fraud Justifies Rescinding Extension of Loan and Demanding Immediate Payment.** In order to entitle the plaintiff to recover in this action (that is, to legally justify its action in rescinding the said promissory note (date), and declaring the money for which it was given to be due and payable immediately, and sue for the same, as was done), it is incumbent upon the plaintiff, in the manner stated, to prove to your satisfaction that the defendant's said officers made the representations charged, or some of them, concerning the defendant's assets and financial responsibility; that the statements so in fact made were, in some material respects charged, false in fact when made, and were so made for the purpose of obtaining credit, as before explained; that they were such as would be liable to be believed to be true, and acted upon as such, by an ordinarily prudent and careful man in the situation of the party to whom they were made, namely to the president and managing directors of the plaintiff bank; that the said president and directors did in fact believe them to be true, and did in fact believe and materially rely upon such statements as true, in accepting the said note (date) in place of and in renewal of the note for a similar amount which matured on that day, and which had been given for a ninety-day loan made on the previous (date).[57]

§ 1132. **Fraudulent Representations of Assumed Agent—When Principal May Be Bound.** If B. assumed to act as the agent of the defendant, S., in the sale of the farm, and had no authority from the defendant so to act, but afterwards the defendant carried out a sale which had been previously negotiated by said B., the defendant is bound by the representations made by the said B., on which the plaintiff relied. In other words, even if B. did not in the first instance have authority from S. to act as his agent, but in the absence of such authority entered into negotiations with the plaintiff and then after S. took up the negotiations which had been so entered into and carried them into effect, S. would be bound by any representations that B. might have made prior to the time he gave them authority.

You are instructed that if you find from the testimony in this case

55—Wells v. Houston, 23 Tex. Civ. App. 629, 57 S. W. 584 (597).

56—Schweizer v. Tracy, 76 Ill. 345.

57—Nat. Bank of Merrill v. Ill. & W. L. Co., 101 Wis. 247, 77 N. W. 185 (189).

that the defendant, S., represented to the plaintiffs that there were 80 or 90 fruit trees on this farm, that any representation previously made by B. and the written memorandum given to the plaintiff by B. previously, are immaterial to this case, and the plaintiff had no right to rely on them.[58]

§ 1133. Deceit—Defendant Entitled to Instruction as to Presumption of Innocence. The legal presumption is that the defendant is not guilty, and he is entitled to have this presumption weighed in his favor.[59]

§ 1134. Bill for Cancellation of Deed—Mental Incapacity or Fraud. The court instructs you that there are two allegations in the bill, either of which, if true, would authorize you to find the issues presented to you for the complainant. First: Was the complainant in such condition mentally at the time of signing the deed and contract in evidence as not to understand the nature and result of the act she was performing? Second: If she did understand the nature and result of her acts, did A. falsely and fraudulently represent the condition of her husband's estate to her at the time, as alleged in the bill, and did she thereby, relying on such statements, sign such deed and contract, when she would not have done so had she known the true condition of such estate? If you find that she did not understand the nature of her act when signing the deed and contract in evidence, because of her mental condition, then you should find both the issues submitted to you in the affirmative. If you find that she did understand the nature and result of her act when signing the deed and contract in evidence, but find she signed the same because of false representations made to her by A., as alleged in the bill, then you should find both issues submitted to you in the affirmative.[60]

§ 1135. Cancellation of Deed—Fraud—Inadequacy of Consideration—Ratification of Deed Made While Intoxicated—Series. (a) The court instructs you that mere inadequacy of price, or the fact that a hard bargain has been driven, is of itself no valid ground for setting aside a contract made by a man of sound mind and fair un-

58—Aldrich v. Scribner (Mich.), 109 N. W. 1121.

59—Childs v. Merrill, 66 Vt. 302, 29 Atl. 532 (533).

"The rule is now generally recognized that the jury should be told that the presumption exists. The plaintiff does not contend that such is not the law, but insists that the jury were so instructed. We are of the opinion that the request was not complied with. The jury were told that the case must be disposed of 'upon a consideration of all the facts and circumstances of the case appearing in evidence,' thus excluding any presumption of innocence."

60—Hoobler et al. v. Hoobler, 128 Ill. 645 (652), 21 N. E. 571.

"The criticism upon this instruction is that it submits to the jury issues different from those which they were impaneled to try. This is clearly a misapprehension. It merely calls the attention of the jury to each of the two substantive grounds of relief set up in the bill, and upon which it is claimed that the instruments which the bill seeks to have cancelled were improperly and wrongfully obtained. The law was given to the jury with substantial accuracy, and there was no material error in the rulings of the court in that respect."

derstanding. In order to consider the question of the value of the property received by J. M. H. you must find that, in addition to inadequacy of price, that there was some relation of confidence and trust, as has been already explained to you; and, in the absence of such confidential relation, you will not consider the adequacy of price, unless you shall find the inadequacy so great as to shock the conscience by its statement.

(b) If you believe from the preponderance of the evidence in this case that the plaintiff, J. M. H., was, on the morning of the —— day of ————, when he admits that he executed the deed to C. M. W., drunk to the extent of complete intoxication, so as to be no longer under the guidance of reason and unable to comprehend the transaction, and that while in that condition he did execute the deed sought to be set aside, then you are instructed that said deed is not valid, and it should be set aside, unless afterwards, when sober, and in his right mind, he ratified and confirmed the same, as will hereafter be explained to you. If, however, he was in such a mental condition as to understand the nature of the transaction, and what disposition he was making of his property at the time, the fact that he was drinking, or had been drinking, would not be sufficient to avoid the deed in suit. And in connection with this plea of drunkenness you are instructed that the parties who sign and execute written instruments are presumed in law to be sober, and competent to make them; and the burden is on J. M. H., and not the defendants to prove by the preponderance of the evidence that at the time he executed said deed he was under the influence of drink to the extent that he could not understand what he was doing.

(c) That if you should find that J. M. H. was so drunk on the —— day of ————, when he executed the first papers, that he did not understand what he was doing, or from the effect of previous hard drinking his mind was so impaired that he could not understand the nature of the transaction, but that afterward, while sober, he did understand the nature of the transaction, and, after fully understanding the nature of the transaction, he did agree to change the contract, by the terms of which J. M. H. received the sum of $500 in cash, and received and used said cash with a full understanding of the transaction at that time, that this would be a ratification of the whole trade; and, if you so find, you will render a verdict in favor of the defendants.

(d) That if you should find that J. M. H. was so drunk on the —— day of ————, when he executed the first papers, that he did not understand what he was doing, or that from the effect of previous hard drink his mind was so impaired that he could not understand the nature of a transaction; and if you should further find that when J. M. H. went back, on ————, and had the previous contracts changed, by which J. M. H. got $—— in cash, and spent it, that still he, the said J. M. H., did not understand what he was doing; but if you believe that afterwards, on ————, the said J.

M. H. received the said cattle, and acknowledged that the cattle then received by him was in full compliance with the previous contracts; and if you believe that at this time the said J. M. H. knew and understood the nature of his previous trade, and that with this knowledge he accepted the cattle as a fulfillment of the contract in part, then you are instructed that this, in law, would be a ratification of the said trade, and you will find for the defendants.

(e) That if you should find that J. M. H. was so drunk on the ——day of ————, when he executed the first papers, that he did not understand what he was doing, or that from the effect of previous hard drink his mind was so impaired that he could not understand the nature of a transaction; and if you should further find that when J. M. H. went back, on ————, and had the previous contracts changed, by which he, J. M. H., got $—— in cash and spent it, and still he, the said J. M. H. did not understand, and was not legally bound by said trade; and if you further believe that, when afterwards, to wit, on ————, the said J. M. H. received the said cattle, and acknowledged that the cattle then received by him was in full compliance with the contract to be performed on that date, and that at that time the said J. M. H. was so drunk that he did not know what he was doing, or did not have sufficient sense to know what he was doing; but if you believe that after he took possession of the cattle, and before he dissolved the partnership, he did understand the trade he had made, and fully understood the trade he had made, and that with this knowledge he remained in the possession of the said cattle, and failed to try or offer to rescind the trade, this would be acquiescence on his part in the trade, and he cannot afterward break it, and, if you so find, you will find for the defendants.

(f) The deed from J. M. H. to C. M. W. conveys not only the interest which he inherited from his father's estate, but also any interest which he may inherit from his mother's estate, or his brothers and sisters. The deed from C. M. W. to J. M. H. conveying the Windmill pasture, which was admitted to have been in his possession, or subject to his control, also recites the first deed, and that it conveys the interest of the father's estate and of the mother's. The jury are instructed that, after admitting the execution of these papers, the plaintiff is conclusively presumed to know what the papers contained. This is what is known in law as an estoppel by deed, and he will not be permitted to deny any of the contents of said deed.

(g) If you find from the evidence that at the time plaintiff executed the written dissolution of the partnership he had then discovered he had been in any material manner defrauded, and that with such knowledge he executed the same, the said instrument estops his recovery herein, even though you should find from the evidence he afterwards discovered other facts of fraud.[61]

61—Wells v. Houston, 23 Tex. Civ. App. 629, 57 S. W. 584 (592-3).

CHAPTER LIII.

HIGHWAYS.

See Erroneous Instructions, same chapter head, Vol. III.

§ 1136. How Created—By Condemnation, Use or Prescription and Dedication. (a) The court instructs the jury, that a public highway may be acquired by condemnation under the statute, by grant from the owner—and after (twenty) years' use by the public, a grant will be presumed—and by dedication to and acceptance of the highway by the public; the acceptance of the highway may be inferred from travel by the public, or from repairs made thereon by the proper public authorities.[1]

(b) You are instructed that the plaintiffs are at liberty to rely upon establishing the highway in question by proving either a condemnation and the opening thereof, in due form under the statute, (twenty) years' continuous adverse use by the public, or dedication by the owner and acceptance by the public; and if you believe, from the weight of the evidence, that the plaintiffs have proven the establishment of the road in controversy, by either one of these methods, that is sufficient upon the question of the road.[2]

1—McQuillin, Mun. Ord. Sec. 527; Washburn on Easements, 125; Grube v. Nichols, 36 Ill. 96.

2—B. & O. S. W. Ry. Co. v. Faith, 71 Ill. App. 59 (61). "When the jury is instructed as

(c) You are instructed, that the plaintiff is at liberty to rely upon establishing the existence of the road by proving either a condemnation under the statute, (twenty) years' continuous adverse use by the public, or dedication by the owner. And if you believe, from the evidence, that the plaintiff has proved the establishment of the road in controversy by either one of these three methods, as explained in these instructions, that is sufficient upon the question of the existence of the road.[3]

§ 1137. Presumption from Laying Out and Working Highway—How Laid Out. (a) If the jury believe, from the evidence, that a public road was laid out over the place in question; that it was used and traveled by the public, and that it was recognized and kept in repair as such by the public authorities for a period of (five) years, or more, before the commencement of this suit, then these facts furnish a presumption, liable to be rebutted by proof, that such road is a public highway.[4]

(b) You are further instructed that if you find from the evidence the road in question was reported by the jury of review to follow certain land lines, but that the road laid out on the ground by the jury of review did not in fact follow such land lines, then you are instructed that the true public road is the one actually laid out on the ground by the jury of review, and not the land lines, or the route delineated or described in the report of the jury of review.[5]

§ 1138. Monuments Control Courses and Distances. The jury are instructed, that the rule of law is, if there is any discrepancy between the courses and distances, as given in the order of the commissioners, and the monuments mentioned in the survey of the road, or actually placed on the ground, then the monuments must prevail.[6]

§ 1139. What Would Be True Line in Case of Difference Between Road Surveyed and Plat. If you believe, from the evidence, that the surveyor actually surveyed, laid out and located the road on the ground, on what is known as the (north) line, under the direction of the highway commissioners, then that would be the true line, although the survey and plat called for a different line.[7]

§ 1140. Prima Facie Evidence of Location. The court instructs the jury, that the petition, report of the commissioners, the survey

to what facts establish a highway, it is for the jury to say whether such facts have been proved. Grube v. Nichols, 36 Ill. 97. While this instruction might have been more explicit in stating what was necessary to prove in order to establish a statutory highway, yet such omission in this case was not material error."

3—Summers v. The State, 51 Ind. 201.

4—Daniels v. The People, 21 Ill. 439.

5—Kelly v. State, 46 Tex. Cr. App. 23, 80 S. W. 382 (384).

6—Daniels v. The People, 21 Ill. 439; Watson v. Jones et al., 85 Penn. St. 117.

7—Hiner v. The People, 34 Ill. 297.

and plat of the surveyor in locating the road, at the time the road is alleged to have been laid out, are required, by law, to be filed in the office of the town clerk, and when they are so filed they become a part of the public records for the use of the public. And (the copies of) all such papers as have been used in evidence in this case are *prima facie* evidence of the facts stated in them respectively.[8]

§ 1141. **What Is Meant by Dedication—What Constitutes.** (a) By dedication is meant a giving and granting of a right; and before the jury can find that there is a valid road by dedication, at the point in controversy, they must believe, from the evidence, that the owner of the land intended to give, and did give, to the public a right of way over the land, and that the public accepted the gift.[9]

(b) The jury are instructed that if a landowner, by open and visible acts unequivocally indicates to the public and its citizens an intention to throw open a street or alley to the public, and the citizens and the public have acted upon the faith that there was a dedication, the law will treat the acts of the owner as constituting a dedication.[10]

(c) The jury are instructed, that to constitute a dedication of land for a highway, as regards the general public, the owner of the fee must give the right of way to the public, and it must be accepted and appropriated to that use by travel, or a recognition of it as a public highway by repairs, or otherwise, by the proper public authorities. To show a dedication, the acts of both the donor and the public authorities, in these respects, must concur.[11]

§ 1142. **Dedication—What is Evidence of.** The court instructs the jury that the unopposed use of a highway by the public over the land of an individual who is cognizant of the fact, for a short space of time, may be sufficient to raise the presumption of a dedication. Indeed, the use of land for a highway for such a length of time that public accommodations and private rights might be materially affected by an interruption of the enjoyment would be evidence that the landowner intended to dedicate it to the public.[12]

Although it is necessary, in order to show a dedication of land to public use, that the owner intended thus to dedicate it, still, this intention may be manifested by acts or words, or partly by

8—Hiner v. The People, 34 Ill. 297.

9—Elliott Roads and Streets (2d Ed.), chapter 5; Angell Highways, § 132.

10—Faust v. City of Huntington, 91 Ind. 493; Cromer v. State, 21 Ind. App. 502, 52 N. E. 229 (240).

11—State v. Tucker, 36 Ia. 485; Fisk v. The Town of Havana, 88 Ill. 208; Tupper v. Hudson, 46 Wis. 646, 1 N. W. 332.

12—Cromer v. State, supra.

"The principles of law set forth in this instruction have been recognized to be the law in this state in Mauck v. State, 66 Ind. 177. See Town of Marion v. Skillman, 127 Ind. 130, 26 N. E. 676, 11 L. R. A. 55.

both, and if the jury, after considering all the evidence in the case, believe therefrom, that before, etc., that the plaintiff intended to, and did dedicate the land in question to public use, and with that intention, gave the public the right to travel thereon, and to use the same as a highway, and that the public accepted the gift by using and working the road, then this is evidence from which the jury may infer that there was a dedication as claimed.[13]

§ 1143. Dedication of Street by Implication—No Particular Ceremony Required. (a) A land owner may dedicate real estate to the public use by acts as well as by express dedication; and if you find from the evidence in this cause that the former owners of the real estate upon which the railroad is located, sold real estate upon the representations that said real estate was dedicated as a part of a highway or street, and then and there took down the fences and exposed the same to use by the public as a highway, and invited the public to use the same, and it did use the same as such highway, this would be a dedication of said real estate to the public use, and such owner would have no right to retract said dedication or reclaim said real estate.[14]

(b) That no particular form or ceremony is necessary in the dedication of land for a public highway; all that is required is that the owner shall, in some manner, manifest an intention to dedicate it, and that the public shall accept the dedication.[15]

§ 1144. Dedication Must Be Made by the Owner. The jury are instructed, that a primary condition of every valid dedication of land to public use is that it should be made by the owner of the fee. No one but the owner in fee can dedicate land to public use.[16]

§ 1145. Must Be an Intention to Dedicate—Time Dedication Takes Place. (a) To effect a dedication there must be an intention so to do, and such intention may be manifested by acts and accompanying declarations. No particular time is necessary to

13—White v. Smith, 37 Mich. 291; Kennedy v. Le Van, 23 Minn. 513; Raymond v. Wichita, 70 Kan. 523, 79 Pac. 323.

14—Pittsburgh C. C. & St. L. Ry. Co. v. Noftsker, 26 Ind. App. 614, 60 N. E. 372 (373).

"It is well settled that the intent of the owner to devote his land to a public use is an essential element of dedication, and that there can be no valid declaration without it. But this intention may be implied from the declarations, acts or conduct of the landowner. Upon the formal appeal, the court said: 'When the declaration, acts and conduct of the landowner as such as fairly and naturally lead to the conclusion that he intended to dedicate the land to public use, and others have in good faith acted upon his open acts and declaration, the fact that the landowner may have entertained a different intention from that manifested by his acts and declarations is of no consequence. Such secret intentions cannot prevail against the force of his conduct and acts, upon which the public or those dealing with him have relied.' P., C. C. & St. L. Railway Co. v. Noftsger, 148 Ind. 101, 47 N. E. 332."

15—Morgan v. Railroad Co., 96 U. S. 716; Skrainka v. Allen, 2 Mo. App. 387.

16—Baugan v. Mann, 59 Ill. 492; Porter v. Stone, 51 Ia. 373, 1 N. W. 601.

constitute a dedication; it may take place immediately, if the owner of the property intends it shall do so, and the public accepts it.[17]

(b) The jury are instructed, that no specific length of possession by the public is necessary to constitute a dedication of ground as a street or highway. It is only necessary that the owner should manifest an intention to dedicate it for that purpose either by writing, by declarations or by acts, and that the public should accept the dedication as made.[18]

(c) The jury are instructed, that there can be no valid dedication of land to public use without an intention, on the part of the owner, to so dedicate; and although the jury may believe, from the evidence, that the land at the point in question had been used by the public as a highway with the knowledge and consent of the owner, for —— years before, etc., still, this alone is not sufficient to establish the existence of a highway by dedication; it must further appear, from a preponderance of the evidence, that the plaintiff intended to dedicate it to the use of the public as a highway.[19]

§ 1146. **Dedication Must Be Accepted.** (a) The jury are instructed, that a dedication of land to public use may be made by verbal declarations, if accompanied by such acts as are necessary for that purpose; but to make a valid dedication to the public, an intention to appropriate the right to the general use of the public must exist; and in order to establish a dedication of land to the public for a street or highway, there must not only be an act of dedication of the land by the owner for that purpose, but there must be some proof of its acceptance as such by the public, acting through the proper authorities.[20]

(b) If the jury believe, from the evidence, that A. B., while he was the owner of the land at the point in question, dedicated it to public use as a highway, as explained in these instructions, and that the public accepted the dedication, then the portion so dedicated should be deemed to be a public highway.[21]

§ 1147. **Dedication Binding on the Owner and All Claiming Under Him.** The jury are instructed, as a matter of law, that a valid dedication, when once made and accepted, is binding not only on the person making it, but also upon all persons claiming under him by deed or otherwise.[22]

17—Rees v. City Chicago, 38 Ill. 322; Wilson v. Lakeview Land Co., — Ala. —, 39 So. 303; Coward v. Llewellyn, 209 Penn. 582, 58 Atl. 1066.

18—City Chicago v. Wright, 69 Ill. 318; Gentleman v. Soule, 32 Ill. 271; Dougan v. Greenwich, 77 Conn. 444, 59 Atl. 505.

19—Henderson v. Alloway, 3 Tenn. Ch. 688; Mansur v. State, 60 Ind. 357.

20—Kennedy v. LeVan, 23 Minn. 513; Ill. Ins. Co. v. Littlefield, 67 Ill. 368; Mansur v. Haughey, 60 Ind. 364; Field v. Village, etc., 32 Mich. 279; Pitcairn v. Chester, 135 Fed. 587.

21—Town of Havana v. Biggs, 58 Ill. 483; Bartlett v. Bangor, 67 Me. 460; Summers v. State, 51 Ind. 201.

22—Rees v. C. of Chicago, 38 Ill. 322.

§ 1148. Dedication by Sale of Lots Bounded on Streets—Right of Purchaser of Lot to Have Street Remain Open. (a) That when the owner of land, within or near a city or village, lays it off into lots, blocks and streets, and makes a plat of the same, marking thereon the streets and lots, and then sells one or more of the lots, by reference to the plan or plat, he thereby annexes to each lot sold a right of way in the street, which neither he nor his successors in the title can interrupt or take away.[23]

(b) The court instructs the jury, as a matter of law, that if the owner of a piece of land lays it out into lots and blocks, with streets and alleys, and then sells off a lot, bounding the lot by one of the designated streets, then the purchaser of the lot will acquire a right to have the street remain open for street purposes, whether it is so mentioned in the deed or not, or whether the street be accepted by the public authorities or not.[24]

§ 1149. Prescription—Twenty Years' User—Elements of. (a) If the jury believe, from the evidence, that a public road has been used by the public over the place in question, for (twenty) years or more, without interruption, and that the owners of the land have acquiesced therein during all that time, then the law presumes a grant or dedication of the ground upon which the road runs, to the use of the public, for a common highway.[25]

(b) The court instructs you, that a peaceable, continuous and uninterrupted use of a piece of ground, as a highway, by the public for (twenty) years, or more, creates what is called a prescriptive right to use the road as such; and this right continues till it is clearly and unmistakably abandoned by the public. A partial or transient non-user of a road, by reason of the travel being diverted to other roads, is not sufficient to establish an abandonment of such road.[26]

§ 1150. Prescription—Computation of—Travel Must Be Confined to a Particular Route. (a) The jury are instructed, that the public cannot acquire a right by prescription; that is, by a user for (twenty) years, to travel over a tract of land generally. The travel and the right of way must be confined to a specific line or way, that could properly be called a road. That travel may slightly deviate from the thread of a road to avoid an obstruction, and still not change the road itself.[27]

23—Schooling v. Harrisburg, 42 Ore. 494, 71 Pac. 605; Fla. E. Coast Rd. Co. v. Worley, 49 Fla. 297, 38 So. 618; Bartlett v. Bangor, 67 Me. 460; Fisher et al. v. Beard, 32 Ia. 346; Waugh v. Leech, 28 Ill. 488.

24—Highbarger v. Milford, 71 Kas. 331, 80 Pac. 633; Clark v. Elizabeth, 40 N. J. L. 172; Denon v. Clements, 3 Col. 472; Dewitt v. Ithaca, 15 Hor. (N. Y.) 568; Eastland v. Fogo, 58 Wis. 274, 16 N. W. 632.

25—State v. Green, 41 Ia. 693; Elliott Roads and Str. (2d Ed.), Secs. 169-171, and cases there cited.

26—Town of Lewistown v. Proctor, 27 Ill. 414; Dexter v. Tree, 117 Ill. 532, 6 N. E. 506; City of Ottawa v. Yentzer, 160 Ill. 509, 43 N. E. 601.

27—Nelson v. Jenkins, 42 Neb.

(b) You are further instructed, that if various and distinct lines of travel have been used at different times across a piece of land, the time during which the different lines have been used cannot be so computed as to make up the requisite (twenty) years to establish a prescriptive right of way to any single line of road.[28]

§ 1151. **Prescriptive Right—Adverse User—Wild, Uninclosed, Uncultivated Land.** (a) You are instructed that a public highway may be established by adverse use for a period of 10 years or more. A peaceable, continuous and uninterrupted use of a piece of ground as a road by the public for 10 years or more creates what is called a "prescriptive right" to use the road as such, and this right continues until it is clearly and unmistakably abandoned by the public.

(b) The jury are instructed that, before a highway can be established by adverse user, it must be shown by a fair preponderance of the evidence that the same has been traveled and used by the public as a highway, and has been claimed as such for ten years continuously, and that the travel thereon has been confined to definite, fixed limits, which must be the same as the boundaries of the highway sought to be established.

(c) You are instructed that no highway can be established by adverse user of wild, uninclosed or uncultivated lands.[29]

§ 1152. **Ocean a Public Highway.** (a) The court instructs the jury that the ocean is a public highway.

(b) Cases must be decided upon the evidence introduced, and not with reference to any individual knowledge that any juror may have; and I give now the general instruction that, nothing appearing to the contrary, the ocean is a highway.[30]

§ 1153. **Waiver—Acquiescence by Public.** If you believe, from the evidence, that the public acquiesced in the placing of the obstruction complained of in the road in question, by the defendant, and that the public accepted the road spoken of by the witnesses as ("the north road") in lieu of the road in question, and used the said substituted road for a period of (five) years before the commencement of this suit, then the public have waived their right in the defendant's land at the point of the obstruction, and the plaintiff is not entitled to recover in this suit.[31]

133, 60 N. W. 311; Howard v. State, 47 Ark. 431, 2 S. W. 331; Kelsey v. Furman, 36 Ia. 614; Davis v. Clinton City Council, 58 Ia. 389, 10 N. W. 768.

28—Gentleman v. Soule, 32 Ill. 271, 83 Am. Dec. 264.

29—Nelson v. Jenkins, 42 Neb. 133, 60 N. W. 311.

"It is a familiar doctrine that instructions to the jury must be construed together, and, if then they state the law applicable to the issues and evidence, it is sufficient. Gray v. Farmer, 19 Neb. 69, 26 N. W. 593; Bartling v. Behrends, 20 Neb. 211, 29 N. W. 472; Campbell v. Holland, 22 Neb. 589, 35 N. W. 871; City of Lincoln v. Smith, 28 Neb. 762, 45 N. W. 41. Considering these three instructions together, it is manifest that the law was stated quite as favorable to the plaintiff in error as he was entitled to."

30—Hildreth v. Googins, 91 Me. 227, 39 Atl. 550 (551).

31—Grube v. Nichols, 36 Ill. 92.

§ 1154. **Unsafe Condition of Road.** Under the issue of this case, the plaintiff cannot recover unless the jury find from the evidence that nowhere along this road were there two consecutive miles of said road as was required by the charter. . . . By the terms of this contract, if the defendant has not complied with the provisions, it is incumbent upon the plaintiff to show by a preponderance of evidence that the matters and things complained of in the original pleadings, viz., that the —— of ——, 1890, from that down to the commencement of the action, the defendant's toll road was broken, worn out, and destroyed, and the planks displaced, rotten and warped, and the roadbed full of holes, gullies, ruts, excavations, through, over and upon the entire length; that the defendant's road was dangerous, and continued to be dangerous, inconvenient and unsafe; and that it was not so constructed as to permit carriages and vehicles conveniently and easily to pass each other thereon for any two consecutive miles.[32]

32—People v. Detroit & S. Plank R. Co., 131 Mich. 30, 90 N. W. 687.

For further instructions on this subject, see chapters on Negligence.

CHAPTER LIV.

INSURANCE—FIRE.

See Erroneous Instructions, same chapter head, Vol. III.

Note. As many of the principles of fire insurance are applicable to life insurance, and vice versa, this and the following chapter on life insurance should be consulted.

§ 1155. **Elements of Contract of Insurance.** The court instructs the jury that in order to make a valid contract of insurance several things must concur. First, the parties must agree upon the company in which the insurance is to be placed; second, the amount of the insurance must be definitely fixed; third, the duration of the risk must be agreed upon, and the contract must be definite and

certain. The absence of either or any of these requisites is fatal, and if you believe, from all the evidence in this case, that all of the above requisites were not mutually agreed upon and understood prior to the destruction of the property, then the plaintiff is not entitled to recover, and your verdict should be for the defendant.[1]

§ 1156. **Destruction Defined.** If the property or any part of it was so damaged by fire as to render it useless for the purposes for which the property had been used, then that is a destruction within the meaning of the law.[2]

§ 1157. **Furnishing Proofs of Loss—May Be Made by Agent.** (a) The jury are instructed, that the policy in this case provides that the assured shall, after a loss by fire, forthwith give notice of such loss to the insurer, and as soon thereafter as possible, render to the company a particular account of the loss, signed and sworn to by him, stating, among other things, how the fire originated, etc.; this particular account and certificate of the officer are what are understood as "proofs of loss;" the meaning of this language is that the assured shall, as soon after the fire as he reasonably can under all the circumstances of the case, give notice to the company of the loss and furnish to the company such proofs of loss; that is, he shall not be guilty of any unnecessary delay in giving such notice or in furnishing such proofs.[3]

(b) Under the terms of the policy sued on, the plaintiff was required to make proof of loss, and the making of such proof in accordance with the terms of the policy was a condition precedent to plaintiff's right to recover, unless such proof of loss was waived by the defendant; and if the jury find from the evidence that proof of loss was not made by the plaintiff, and that defendant did not waive such proof of loss, then the plaintiff cannot recover, and the jury must return a verdict for defendant.[4]

(c) The court instructs the jury, that if you believe, from the evidence that G., the insured, was, at the time of the fire absent from his home in Winchester, Illinois, and could not be found, so as to make proofs of the loss within the time specified by the policy, then in that case, such proofs of loss could be made by the agent of the said G.[5]

1—Ins. Co. of N. A. v. Bird, 175 Ill. 42, aff'g 74 Ill. App. 306, 51 N. E. 686.

2—Manchester Fire Assur. Co. v. Feibelman, 118 Ala. 308, 23 So. 759.

3—Columbia Ins. Co. v. Lawrence, 2 Peters 25; Perry v. Caledonian Ins. Co., 103 App. Div. 113, 93 N. Y. S. 50; Perry v. Greenwich Ins. Co., 137 N. C. 402, 49 S. E. 889; Hodgkins v. Montgomery etc., Ins. Co., 34 Barb. 213; McCarm v. Ætna Ins. Co., 3 Neb. 198; Niagara District Ins. Co. v. Lewis, 12 U. C. C. P. 123.

4—Feibelman v. Manchester Fire Assur. Co., 108 Ala. 180, 19 So. 540 (546).

5—Brunswick B. C. Co. v. Northern Assur. Co., 142 Mich. 29, 105 N. W. 76; Wood on Fire Ins., p. 693, §413; Ayres v. Hartford Ins. Co., 17 Iowa 176, 85 Am. Dec. 553; Farmers' Mutual Ins. Co. v. Grayville, 74 Pa. St., 17, 15 Am. Rep. 542; O'Connor v. Hartford Fire Ins. Co., 31 Wis. 160; Northwestern Ins. Co. v. Ad-

§ 1158. **Waiver of Proofs of Loss.** (a) If the adjuster of defendant visited the scene of the fire, investigated the circumstances attending it, and this was in November following the fire in October, and made no objection to the failure of plaintiff or plaintiff's assignor to furnish the proof of loss, then it is the duty of the jury to ascertain from all the evidence whether the preliminary proofs of loss were thereby waived.

(b) If the jury believe from the evidence that the plaintiff has reasonably satisfied you of the truth of his replications, your verdict will be for the plaintiff, unless they further believe that either C. or N. burned the house or removed the goods before the fire.[6]

(c) And in this case, if you believe, from the evidence, that the agent of the company said to the plaintiff after the company had notice of the loss and had inquired into the circumstances attending it, that they would not pay any claim under that policy for the reason (because the building was not occupied at the time of the fire) this would amount to a waiver of the necessity of furnishing proofs of loss.[7]

(d) If the jury believe, from the evidence, that the plaintiff within, etc., furnished to the defendant what purported to be proofs of loss, though not in exact conformity with the terms of the policy, and that these proofs were accepted by the company without objection or without suggesting that they did not conform to the terms of the policy and objecting to them for that reason, then the defendant is estopped from claiming that such proofs were insufficient.[8]

§ 1159. **Waiving Prompt Compliance—Estoppel.** The jury are instructed, that an insurance company may waive, not only imperfections and deficiencies in the statement of loss and proofs required by the policy, but it may also waive a prompt compliance with the provisions of the policy as to the time of giving notice and presenting proofs of loss. And if the jury believe, from the evidence, that the plaintiff, before the expiration of a reasonable time for furnishing proofs of loss after the fire, went to an agent of the company and requested time for furnishing such proofs, and was then told by the agent that the question of title was the only question so far as the company was concerned, and that he

kinson, 3 Bush (Ky.) 328; Sims v. State Ins. Co., 47 Mo. 54, 4 Am. Rep. 311; Ger. F. Ins. Co. v. Grunert, 112 Ill. 69.

6—Liverpool & L. & Gl. Ins. Co. v. Tillis, 110 Ala. 201, 17 So. 672 (674).

7—Aurora F. & M. Ins. Co. v. Kranich, 36 Mich. 289; Keenan v. Mo. St. Mutual Ins. Co., 12 Ia. 126, 79 Am. Dec. 524; Burgess v. Merc. G. Mut. Ins. Co., 114 Mo. App. 169, 89 S. W. 568.

8—Harriman v. The Queen Ins. Co., 49 Wis. 71, 5 N. W. 12; Kenney v. Home Ins. Co., 71 N. Y. 396, 27 Am. Rep. 60; Spratley v. Hartford Ins. Co., 1 Dill. Cir. Ct. 392; Patterson v. Triumph Ins. Co., 64 Me. 500; St. Louis Ins. Co. v. Kayle, 11 Mo. 278; North British & Mer. Ins. Co. v. Edmundson, 104 Va. 486, 52 S. E. 350.

might take his own time to prepare and furnish proofs, to furnish them at his convenience, and plaintiff, relying upon such statements, neglected to prepare the proofs as soon as he might otherwise have done, but did, afterwards, at his convenience and more than sixty days prior to the bringing of this suit furnish to the company proofs of loss, then the company is estopped from objecting that the proofs were not furnished in proper time.[9]

§ 1160. Urging One Ground of Invalidity Waives All Other Known Forfeitures—Authority of Adjuster. (a) I charge you that when only one ground of forfeiture is urged as the reason for the invalidity of the policy it is a waiver of all other forfeitures or breaches which were known to the defendant.

(b) If you believe from the evidence that A. was sent here for the purpose of adjusting the loss of this plaintiff, and that he, the said A., had apparent authority to settle such loss and that in conformity with his authority and apparent power the said A. entered into the investigation of said loss, and this plaintiff had no knowledge of his limited authority, and no notice of any facts sufficient to put the plaintiff on inquiry by which he could discover such limitations, then I charge you you must find for the plaintiff on the question of authority of A. to bind the defendant.

(c) The burden of proof on the plaintiff as to the authority or power of A. to waive breaches of the contract of insurance is discharged upon the plaintiff showing to your reasonable satisfaction that the said A. had apparent authority so to do.

(d) I charge you that the letters introduced in evidence can only be looked to by you as tending to show the authority of A.

(e) If A. had apparent authority to waive on behalf of this defendant a breach of any conditions of the policy, then I charge you if you are reasonably satisfied from the evidence that said A. was so held out by the defendant, or had apparent authority so to do, then I charge you that private limitations upon his authority are as though no such limitations existed as to the issues in this cause, unless you further believe from the evidence that the plaintiff knew of these facts sufficient to put him on inquiry, which, if followed, would have disclosed to the plaintiff such limitations.

(f) Before you can find that the defendant by its conduct waived any forfeiture of the policy, if there was such forfeiture, you must find from the evidence that the defendant or its authorized agent, had knowledge of the material facts constituting such forfeiture.[10]

9—Underwood v. Farmers' Joint S. Ins. Co., 57 N. Y. 500; Dohn v. Farmers' Joint S. Ins. Co., 5 Lans. 275.

10—Georgia H. Ins. Co. v. Allen, 128 Ala. 451, 30 So. 537 (538); Ohio Farmers' Ins. Co. v. Vogel, — Ind. App. —, 73 N. E. 612. But see Emanuel v. Maryland Cas. Co., 94 N. Y. S. 36, 47 Misc. (N. Y.) 378, where it was held adjuster could not waive provisions of policy.

§ 1161. **If Defendant Denies Liability Plaintiff Not Obliged to Furnish Further Proofs.** If you believe, from the evidence, that the plaintiff furnished to the defendant within, etc., what purported to be proofs of loss, though not in exact conformity to the requirements of the policy, and that they were objected to upon that ground, still, if you further believe, from the evidence, that the defendant then denied any liability to the plaintiff under said policy, and declared that the company would pay no alleged claim thereunder, then such declarations amounted to a waiver of any further proof of loss, and the plaintiff was under no obligation to furnish any others.[11]

§ 1162. **Mere Silence Not Enough to Infer Waiver of Policy.** You are instructed that in order to effect a waiver of the condition in the policy regarding, etc., you must believe, from the evidence, that the officers or agents of the company either said or did something reasonably calculated to mislead the plaintiff or throw him off his guard in respect to, etc.; mere silence is not enough from which to infer a waiver of this condition of the policy. And in this case, if you believe, from the evidence, etc., this would not amount to a waiver of the condition in the policy.[12]

§ 1163. **False Swearing in Proofs of Loss, Etc.—Intent to Defraud Avoids Policy.** (a) In regard to the sworn statement of plaintiff in his proof of loss that (he was the owner in fee simple of the premises, etc.,) the court instructs you that although you may believe, from the evidence, that the plaintiff at the time was occupying the premises under a lease, these facts alone would not constitute a defense to this action. In order to create a defense under the condition of the policy in relation to false swearing, it must appear, from the evidence, that the plaintiff not only swore falsely, but that he did so willfully and knowingly and with the intention of deceiving the officers of the company.[13]

(b) If you believe, from the evidence, that the plaintiff included in his proofs of loss, which he furnished to the company, articles of property which did not belong to him, knowingly and with intent to defraud the company, knowing that he had no right so to do, this would avoid the policy, and the plaintiff cannot recover in this suit.[14]

11—Harriman v. The Queen Ins. Co., 49 Wis. 71, 5 N. W. 12; Mut. L. Ins. Co. v. Thomas, 101 Md. 501, 61 Atl. 293; Bennett v. Maryland Ins. Co., 14 Blatchf. 422; Rogers v. Traders' Ins. Co., 6 Paige Ch. 583; Phillips v. Protection Ins. Co., 44 Mo. 220.

12—Muller v. S. S. F. Ins. Co., 87 Penn. St. 399; McDermott v. Lycoming Ins. Co., 44 N. Y. S. Ct. 221, 4 Am. Rep. 664.

13—Dogge v. N. W. Nat. Ins. Co., 49 Wis. 501, 5 N. W. 889; Dalton v. Milw. Mech. Ins. Co., 126 Ia. 377, 102 N. W. 120; Herzog v. Palatine Ins. Co., 36 Wash. 611, 79 Pac. 287; Ins. Co. v. Mides, 14 Wallace 375; Franklin Ins. Co. v. Culver, 6 Ind. 137; Planters' Mut. Ins. Co. v. Deford et al., 38 Md. 328; Little v. Phœnix Ins. Co., 123 Mass. 380, 25 Am. Rep. 96; Parker v. Amazon Ins. Co., 34 Wis. 363; Marion v. Great Rep. Ins. Co., 35 Mo. 148; Franklin F. Ins. Co. v. Updegraff, 43 Penn. St. 350.

14—Farmers' Mut. F. Ins. Co. v. Garrett, 42 Mich. 289, 3 N. W. 951;

§ 1164. Premises Becoming Unoccupied Renders Policy Void. (a) In determining, under the evidence, whether the premises became unoccupied and so remained for thirty days or more, at and before the loss, you are instructed, as a matter of law, that when the property insured is a dwelling house, the occupancy required under such a policy as this, is such occupancy as ordinarily attends a dwelling house; the word "unoccupied" in the policy is to be construed in its ordinary and popular sense; and if you believe, from the evidence, that after the making of the policy, the insured with his family removed from the house and ceased to occupy the same as a dwelling house until the loss, and that this had continued for thirty days or more before the fire, then the policy became void, and you should find for the defendant.[15]

(b) The court instructs the jury that if at any time after the policy was issued the occupants moved out of the house and left no one living there, and the house remained in that condition for ten days or more, said house was unoccupied within the meaning of the law and the plaintiffs are not entitled to recover, and your verdict must be for the defendant.[16]

(c) One of the representations made by the plaintiff in the application upon which the policy was issued was this (set out the representation as to occupancy) and the policy provides among other things that (set out the condition as to the premises becoming vacant). Now, if you believe, from the evidence, that at the time of the fire the premises were vacant, and that the defendant and its officers and agents had had no knowledge or notice of this fact, then the plaintiff cannot recover.[17]

§ 1165. Same Subject—Conditions Under Which Plaintiff Can Recover. If you believe, from the evidence, that the premises, etc., were unoccupied at the time the policy was issued, and that the agent of the company who took the application and issued the policy knew this, then the fact, if proved, that the premises were unoc-

Geib v. International Ins. Co., 1 Dill. Cir. Ct. 443; German Am. Ins. Co. v. Brown, 75 Ark. 251, 87 S. W. 135.

15—Western Assur. Co. v. Mason, 5 Ill. App. 141; Whitney v. Black River Ins. Co., 72 N. Y. 117, 28 Am. Rep. 116; Knowlton v. Patrons' Androscoggin F. Ins. Co., 100 Me. 481, 62 Atl. 289.

16—Hoover v. Mercantile Town Mut. Ins. Co., 93 Mo. App. 111, 69 S. W. 42 (43).

"This instruction contains a correct statement of the law, and the testimony offered by defendant tended to establish the facts mentioned therein. It has been held by the supreme court of Missouri, following a New York case on the same subject, that 'occupation of a dwelling house is living in it.' Cook v. Ins. Co., 70 Mo. 610, 35 Am. Rep. 438. The policy, which should always be closely read for the purpose of determining the intention of the parties, describes the building insured as being 'occupied as a private dwelling.' It is proper, and often necessary, to consider the use for which premises are intended in determining the question whether or not they are 'unoccupied,' within the meaning of such a stipulation as is before us now. Cont. Ins. Co. v. Kyle, 124 Ind. 132, 24 N. E. 727, 9 L. R. A. 81, 19 Am. St. Rep. 77."

17—Aurora F. & M. Ins. Co. v. Kranich, 36 Mich. 289; Gans v. St. Paul F. Ins. Co., 43 Wis. 108, 28 Am. Rep. 535.

cupied at the time of the fire will constitute no defense to this action.[18]

§ 1166. **Premises Temporarily Vacant.** Although the jury may believe, from the evidence, that the house was vacant and unoccupied at the time of the fire, still, if the jury further believe, from the evidence, that such vacancy was but temporary, and was occasioned by the fact that one tenant had but a day or two before moved out to enable another tenant to move in, and that such new tenant had engaged to move, and was about to do so when the fire occurred, this would not render the premises vacant and unoccupied within the meaning of the policy of insurance.[19]

§ 1167. **Duty of the Court to Interpret the Policy—Suit to be Brought Within Twelve Months.** The jury are instructed that it is the duty of the court to interpret and give the meaning of the contract or policy offered in evidence in this case, and the court instructs the jury that by the terms of the policy, the plaintiff cannot sustain this suit, unless it was commenced within twelve months after the loss, if any occurred, or unless the defendant has waived that provision of the policy, and if the jury believe, from the evidence, that the loss in question occurred on, etc., then the jury should find the issues for the defendant, unless the jury further believe, from the evidence, that the defendant had, in some manner, waived the necessity of commencing suit within twelve months after the loss, as explained in these instructions on that point.[20]

§ 1168. **Non-Payment of Premium—Waiving Prompt Payment.** (a) If the jury believe, from the evidence, that the premium mentioned in the policy had not been paid at the time of the fire, then, under the pleadings in this case, to warrant a finding for the plaintiff, the jury must believe from the evidence that such payment was either waived by the defendant or that the defendant agreed with the plaintiff to wait for such payment until some definite period of time subsequent to the happening of the loss—and, in arriving at a conclusion upon these questions, the jury have a right to consider the conduct of the parties in reference thereto, so far as it appears in evidence, together with all the other evidence in the case.[21]

(b) The policy of insurance in this case contains a condition that the company should not be liable for any loss occurring when the

18—Aurora F. & M. Ins. Co. v. Kranich, 36 Mich. 289; Ætna Ins. Co. v. Meyers, 63 Ind. 238.

19—Whitney v. Black River Ins. Co., 72 N. Y. 117, 28 Am. Rep. 116; Cummins v. Agricultural Ins. Co., 67 N. Y. 260, 23 Am. Rep. 111.

20—Riddlesbarger v. Hartford Ins. Co., 7 Wall. 386; Portage Co. Mut. Ins. Co. v. West, 6 Ohio St. 599; Keim v. Home Mut. Ins. Co., 42 Mo. 38, 97 Am. Dec. 291; Peoria Marine F. Ins. Co. v. Whitehill, 25 Ill. 466; Merchants Mut. Ins. Co. v. La Croix, 35 Tex. 249, 14 Am. Rep. 370.

21—Southern L. Ins. Co. v. Booker, 9 Heisk. 606; Mich. Mut. L. Ins. Co. v. Powers, 42 Mich. 19, 51 N. W. 962; Beadle v. Chenango County Mut. Ins. Co., 3 Hill 161; Ayre v. New England Mut. L. Ins. Co., 109 Mass. 430; Howard v. Continental Ins. Co., 48 Cal. 229.

premium note is wholly or in part past due and unpaid; and if you believe, from the evidence, that when the loss occurred, there was any portion of the premium note due and unpaid, then the defendant is not liable for such loss, unless you further believe, from the evidence, that the defendant had in some manner waived or excused the prompt payment of such premium note, as explained in these instructions.[22]

§ 1169. **Estopped by Uniform Course of Business.** The court instructs you, as a matter of law, that a local agent of an insurance company may be authorized by the course of business to waive the conditions and stipulations in the policy, and the company may be bound thereby, notwithstanding the policy says that he may not do so; and if the jury believe, from the evidence, that for a number of years it had been the uniform practice of the defendant to give notice of the time when the premium would fall due, and to collect the same through a local agent residing in the neighborhood, then good faith required that this mode of collection should not be discontinued and payment required at the home office, under penalty of a forfeiture, without notice to the plaintiff.[23]

§ 1170. **Increased Hazard—Knowledge of.** (a) The court instructs the jury that the defendant cannot be held to have waived the condition of the policy with respect to the increase of risk, unless the jury believe, from the evidence, the defendant by its agents had knowledge of the extent and character of the increase of risk, if the risk was increased; and with such knowledge of the extent and character of such increase of risk consented thereto, or so conducted themselves toward the plaintiff as to induce a reasonable belief in the mind of the plaintiff that such increase of risk would not be insisted upon by the defendants as a defense to the policy.[24]

(b) If you believe, from the evidence, that shortly after the first fire, and from that time forward until the second fire, there was a material and considerable increase of the hazard from fire to the insured property, occasioned by reconstruction of the premises and building mentioned in the policy, and changes, alterations and repairs of the same, and by the continuous presence during that time in said premises and building of a large number of workmen and mechanics engaged in said work and that the plaintiff, during all of said time, had knowledge of said continuous work by said workmen, and that the plaintiff did not notify the company of said facts so

22—Garlick v. Miss. Vall. Ins. Co., 44 Ia. 553; Shakey v. Hawkeye Ins. Co., 44 Ia. 540; Wheeler v. Conn. Mutual Life, 16 Hun 317; Patch v. Phœnix Mut. Ins. Co., 44 Vt. 481; Sullivan v. Cotton St. L. Ins. Co., 43 Ga. 423; Jefferson Mut. Ins. Co. v. Murray, 74 Ark. 507, 86 S. W. 813.

23—Union Cent. L. Ins. Co. v. Potker, 33 Ohio St. 459; 31 Am. Rep. 555; Mound City Ins. Co. v. Twining, 19 Kans. 349; Ga. Ins. Co. v. Kinner, 28 Gratt. 88; McCraw v. Old N. St. Ins. Co., 78 N. C. 149.

24—North British Ins. Co. v. Stieger, 124 Ill. 81 (87), 16 N. E. 95.

known to him and so increasing said hazard, and that the agents of the company at Chicago, named in the policy, did not have knowledge of such fact while such work was in progress, then you are instructed that the policy in this case, by reason of said increased hazard, became and was wholly void, and in that case no verdict can be rendered upon it as to the loss or damage by the second fire.[25]

§ 1171. Application is Made a Warranty—Warranty as to Title. (a) One of the conditions in the policy is that any false representation made by the assured, of the condition of the property, or of its occupancy, or of any fact material to the risk, will avoid the policy; and so the court instructs you, as a matter of law, that any matter material to the risk, if contained in the application, and if it was untrue, in fact, will avoid the policy, whether it was made intentionally or not (unless you find, from the evidence, that the company is estopped by the conduct of its agent from setting up such matters in defense as explained in these instructions.)[26]

(b) The policy of insurance in this case refers to the written application of the plaintiff and makes it a warranty of all the matter of facts therein stated. The application contains these questions and answers: Title—is your title to and interest in this property absolute? If not state its amount, and give the name, interest and amount of others concerned; answer, Yes. The court instructs the jury that the legal effect of the policy and of these questions and answers is that they amount to a warranty that the plaintiff was the sole and absolute owner of the property. While the deeds and title papers introduced in evidence show that the title to an undivided half of the property was in one A. B. at the time, and your verdict, therefore, must be for the defendant, unless, etc.[27]

§ 1172. Warranty as to Amount of Incumbrance—Waiver of Conditions—Estoppel. (a) You are instructed that by the terms of the policy introduced in evidence, the insured warrants the truth of all the material statements contained in his application for insurance, and among the matters so warranted by the plaintiff is the statement that the incumbrances on the property insured only amounted at that time to the sum of ($1,000). This was a representation of a then existing fact respecting the property insured, which was material to the risk, and if it was not substantially true, this would render the policy void. If, therefore, you believe from the evidence, that at the time of the making of the said application there was other incumbrance on said premises over and above the said ($1,000) to the amount of, etc., and that this was not called to the attention of the agent who took the application and that he

25—Mech. Ins. Co. of Phila. v. Hodge, 149 Ill. 298 (308), 37 N. E. 51.

26—Jennings v. Chenango County Mut. Ins. Co., 2 Denio 75; Doll v. Equitable L. Assur. Soc., 71 C. C. A. 121, 138 Fed. 705.

27—Ætna Ins. Co. v. Resh, 40 Mich. 241; Rosenstein v. Traders

had no notice or knowledge of such other incumbrance, this would render the policy void, and the plaintiff cannot recover in this suit.[28]

(b) Although you may find, from the evidence, that there was other incumbrance on the property over and above the ($1,000) mentioned in the application for insurance, still, if you further believe, from the evidence, that all the facts and circumstances connected with such other incumbrance were called to the attention of the agent who took said application, and that he advised the plaintiff that, in view of such circumstances, it would be unnecessary to mention such other incumbrance and that it was in consequence of such advice that such addition and incumbrance was omitted in the application, then the defendant is estopped from urging such omission as a defense to this action, and as to that question, you should find in favor of the plaintiff.[29]

(c) If the evidence shows that U. was the agent of the insurance company at Jacksonville, in the business of insurance of such property as it insured for plaintiff, and that he had the policies of H. in his possession, and then knew that H. had mortgaged all the one hundred acres of land mentioned in the policy, except one forty acres on which the house or building insured stood, and if the evidence shows that said policy, on its face, shows that the lands named in said policy consisted of one hundred acres, and if the evidence further shows that H. told U., at the time, that he had made the mortgage to L., and asked U. if it was necessary to have the same indorsed with a permit or consent to mortgage the property, of the company, and that U. told him (H.) that it was not necessary and that it was only necessary to have a permit for a mortgage for the forty-acre tract on which the house stood, then, in law, under such facts, if proven, the defendant waived the forfeiture in said policy.

(d) The court further instructs the jury, that under the insurance policy in evidence is a provision that in case any mortgage or incumbrance is put on the property insured, without written consent of the insurance company, indorsed on the policy, said policy shall become void; yet, in law, such forfeiture may be waived by the insurance company, and in this case, if you find, from the evidence, that a mortgage was put on said premises without the written consent or permit of the defendant still, if the evidence shows that very soon after the execution of said mortgage H. went to U. and that U. was then the agent of said insurance company in the business of insuring such property as it insured for plaintiff, and told

Ins. Co., 102 App. Div. 147, 92 N. Y. S. 326.

28—Schumitsch v. Am. Ins. Co., 48 Wis. 26, 3 N. W. 595; Ryan v. Springfield Ins. Co., 46 Wis. 671, 1 N. W. 426.

29—Rockford Ins. Co. v. Nelson, 75 Ill. 548; Harriman v. Queen's Ins. Co., 49 Wis. 71, 5 N. W. 12.

him of said mortgage, and that said U. stated to him that it was all right, and that there need be no permit or consent of the company indorsed on the policy allowing said mortgage, because it was not on the forty-acre tract, on which the house stood, then, in law, said conduct of said agent would be a waiver of said forfeiture, and under this state of facts, if proven, the mortgage would not make void the policy.[30]

§ 1173. Fraud—Knowledge of Agent Knowledge of the Company. If the jury believe, from the evidence, that the application for insurance was filled out or drawn up by the agent of the defendant and that the insured honestly, frankly and fully disclosed to such agent the real facts in regard to, etc., and that the insured was induced to take out the policy and pay the premium by the assurances of such agent that the form in which the facts in regard to, etc., were stated in the application was the correct one, then the defendant is estopped from claiming any advantage from any misstatement in the said application in regard to, etc., if the same has been proved.[31]

§ 1174. Condition as to Other Insurance—Waiving Condition. (a) That among the conditions in the policy sued on, is one which provides: that if the assured should thereafter procure any other insurance, etc.; and the court instructs you, that if you find, from the evidence, that the plaintiff, after receiving the policy from the defendant company, and before the loss in question occurred, obtained other insurance upon the property, which had not expired at the time of the fire, and that no notice thereof was given to the defendant, its agents or officers, before the fire, or to which the company or its agents did not consent, then this would render the plaintiff's policy void, and he cannot recover in this suit.[32]

(b) Although you may believe, from the evidence, that after receiving the policy from defendant the plaintiff did procure other insurance on the property in question (without having the consent of the secretary written on the policy), still, if you further believe, from the evidence, under the instructions of the court, that A. B. was at the time the general local agent at S., and had authority to receive and take applications for insurance by defendants, and to

30—Phenix Ins. Co. v. Hart, 149 Ill. 513 (515, 516, 525), 36 N. E. 990.

"We are of the opinion that the company was estopped from insisting upon the forfeiture set up in its pleas, and while the instructions given may not have been technically correct, they stated the law applicable to the facts of the case with substantial accuracy."

31—Lasher v. N. W. Nat. Ins. Co., 55 How. (N. Y.) Pr. 318; Manhattan F. Ins. Co. v. Weill, 28 Gratt. 389; McCall v. Phœnix, etc., 9 W. Va. 237, 27 Am. Rep. 558; Home Ins. Co. v. Lewis, 48 Tex. 622.

32—Am. Ins. Co. v. Gallatin, 48 Wis. 36, 3 N. W. 772; Mellen v. Hamilton Fire Ins. Co., 17 N. Y. 609; Burt v. People's Mut. F. Ins. Co., 2 Gray 397; Shurtliff v. Phœnix Ins. Co., 57 Me. 137; New York Cent. Ins. Co. v. Watson, 23 Mich. 486; Lockey v. Georgia Home Ins. Co., 42 Ga. 456; Jewett v. Home Ins. Co., 29 Ia. 562.

make contracts for the company in relation thereto—and further, that while the said A. B. was so acting as agent, the plaintiff notified him of his intention to take such additional insurance and afterwards told him he had done so, and that neither the said agent, nor any one else on behalf of defendant, notified the plaintiff that such additional insurance, without being indorsed on the policy (or consented to in writing by the secretary), would render or had rendered the policy void, then the defendant must be deemed to have waived the condition in the policy regarding such additional insurance, and the plaintiff's right of recovery will not be affected thereby.[33]

§ 1175. **Other Insurance Known to the Defendant.** Although the jury may believe, from the evidence, that the plaintiff had other insurance on the property in question not indorsed upon the policy, still, if the jury further believe, from the evidence, that the existence of such other insurance was known to the defendant when its policy was issued, then these facts would amount to a waiver of the condition requiring additional insurance to be indorsed on the policy or consented to by the defendant in writing.[34]

§ 1176. **Representations as to Incendiarism.** Among the questions propounded to the insured, in the application for insurance, was this: Incendiarism—have you any reason to believe your property is in danger from it? and the answer is, No. And the court instructs the jury, as a matter of law, that that question and answer related to a matter which was material to the risk, and if you believe, from the evidence, that at the time that application was made and the policy sued on in this case issued, the plaintiff knew that an attempt had then recently been made to burn the premises insured, and that he failed to disclose that fact to the defendant's agent who took the application and delivered the policy, then these facts would render the policy void, and the jury should find for the defendant.[35]

§ 1177. **Non-Compliance with Conditions.** Among the conditions of this policy is this: ("If the interest of the assured in the property be other than the entire, unconditional and sole ownership of the property for the use and benefit of the assured, it must be so represented to the company, and so expressed in the written part of this policy, otherwise this policy shall be void;") and the court instructs you, that if you believe, from the evidence, that the plaintiff was not the sole and absolute owner of the property

33—Am. Ins. Co. v. Gallatin, 48 Wis. 36, 3 N. W. 772; Geib v. International Ins. Co., 1 Dill. Cir. Ct. 443; Goodall v. New England Mut. F. Ins. Co., 25 N. H. 169; Ins. Co. of N. Am. v. McDowell, 50 Ill. 120, 99 Am. Dec. 492; Schenck v. Mercer County Mut. Ins. Co., 24 N. J. 447; Hayward v. N. Ins. Co., 52 Mo. 181, 14 Am. Rep. 400; Contra: Worcester Bank v. Hartford F. Ins. Co., 11 Cush. 265.

34—Richardson v. Westchester F. Ins. Co., 15 Hun 472; Carr v. Hibernia F. Ins. Co., 2 Mo. App. 466; Goodall v. New England Mut. F. Ins. Co., 25 N. H. 169; Ins. Co. of N. Am. v. McDowell, 50 Ill. 120, 99 Am. Dec. 497.

35—North Am. F. Ins. Co. v.

insured, holding the same for his own use and benefit at the time he made the application for insurance and he did not notify the agent of the company of that fact, then this would render the policy void, and the plaintiff cannot recover, unless the jury further believe, from the evidence, that the agent of the company knew the facts in relation to the ownership of the property or had knowledge of such facts as ought to have put a reasonably prudent and careful man upon inquiry with reference thereto.[36]

§ 1178. Agreement to Renew—Liability for Failure to Renew Insurance. (a) In this case, the burden of proof is on the plaintiff, and unless the evidence preponderates in behalf of plaintiff he cannot recover. In no event can he recover more than $——. Before the plaintiff can recover, he must prove by a preponderance of the evidence that the defendant, by an agent authorized so to do, agreed to renew the $—— policy for the plaintiff, and failed to do so, and that the property described in the policy was lost by fire.

(b) By law it was not the duty of defendant to renew such policy. The defendant could only be made liable by its agreement to renew, and the burden of proof is on the plaintiff to show that the defendant did agree to renew the $—— policy.

(c) The court instructs the jury that any statement in the board of directors by any individual that the company ought to pay the loss is not binding on the company, and should not be considered by the jury.

(d) It is not shown here that the association could recover the loss if it paid it, of the notary, and you should disregard all arguments or statements of counsel to that effect, or that tend to discredit the witnesses called by him.[37]

§ 1179. Location—Removal of Property as Affecting Risk. If the jury conclude from the evidence that said property was not located in said two-story building at the time defendant assumed the risk, then the removal of the property from other location would not violate the contract of insurance as defendant has not alleged such removal as a defense to plaintiff's action: Rather, in this case, the defendant not having alleged it it would not give to the defendant the right to prove it and rely on it in this case. And with that correction I charge you that—because it makes no difference where the property was actually located; it is where defendant assumed the risk; and removal from or absence from the place is sufficient to avoid the insurance, and removal from one place to another cannot be excused because the removals did not begin from

Throop, 22 Mich. 146, 7 Am. Rep. 638.

36—Smith v. Commonwealth Ins. Co., 49 Wis. 322, 5 N. W. 804; Ins. Co. of No. Am. v. Erickson, 50 Fla. 419, 39 So. 495; St. Landry Wholesale Merc. Co. v. New Hampshire F. Ins. Co., 114 La. 146, 38 So. 87. See also Glens Falls Ins. Co. v. Michael, — Ind. —, 74 N. E. 964, where contract held to be voidable instead of void.

37—Andryczka v. The Towarzstwo, 86 Ill. App. 229 (231).

the place where defendant assumed the risk, and the defendant did allege that the property was removed from the two-story building where it assumed the risk, and had the right to prove it and to rely on it in the case, because it was the effect of the removal, to wit: the absence of the property from the place of assumption of risk, and not the act of removal, that was material.[38]

§ 1180. Property Insured in Wrong Name—Husband and Wife. (a) The defendant alleges that this property was insured, not in the name of Mary J. M., but in the name of J. D. M., and that Mary J. M. was not insured at all by the defendant. The defendant must prove that by the preponderance of the evidence.

(b) In a civil case, a party who alleges a fact material to the case must prove it. And so a plaintiff that comes into court and alleges that the defendant is indebted to him in a certain way, setting out the facts out of which the indebtedness arises, is bound to prove the allegations necessary to establish his claim by the preponderance of the evidence. And in this case the plaintiff must prove what she alleges in this complaint in reference to the insurance of her property by the defendant, and the destruction of the property while the insurance was in force, and the failure of the defendant to pay its obligations arising upon the destruction of the property. If she establishes these facts she is entitled to a verdict, unless the defendant defeats her right to recovery by something which it alleges on its part.

(c) The court instructs you that if a party acts for his wife in insuring and could insure for her by insuring in her own name, and acts as her agent in adjusting her loss in his name, and makes demand for her in his name, she would be bound by a suit instituted for recovery in his name as a suit for her by her agent or express trustee, if the suit was expressly instituted by him as trustee or agent of his wife, but not otherwise. If the suit had gone into final judgment on the merits of the case it might be a bar, but not otherwise; but if it should appear to you, from the facts of the case, that there has been another suit in this case by the husband of the plaintiff in reference to the insurance, and that suit was terminated by a discontinuance of the suit, and not by the judgment of the court in determining the rights of the parties, and determining that the plaintiff was not entitled to recover, but by a discontinuance—

38—Montgomery v. Del. Ins. Co., 67 S. C. 399, 45 S. E. 934 (938).

"The question here is, whether the judge erred in charging the jury as above quoted. We think not. There was no allegation in the answer of insurance in the Clarke building, or of removal therefrom, and such removal was not an issue in the cause. The defendant got the benefit of the law of removal and of destruction at a location other than that at which insured, by his 8th, 9th, 10th, 11th and 12th requests, under which the judge charged, substantially, that the defendant would not be liable for a loss by fire at a location other than that at which it was when insured, unless the defendant had waived its right to object to the removal by consent given before or after, or by acquiescence."

something that does not determine the rights of the parties at all—then it could not be a bar, either to the agent himself, J. D. M., to renew the suit, and specially not to the plaintiff, if she were of his principal, or his cestui que trust, the party for whom he was trustee.

(d) If the acts of J. D. M. did not bind M. J. M. in all respects as to taking out insurance, suing on the policy in his name, and dealing with the adjuster, M. J. M. cannot treat the acts of the adjuster as transactions with her, redounding to her benefit as matters of waiver, if the acts of the adjuster, or his declarations or dealings or conduct, were made solely with reference to J. D. M. as a person; but if they were made with reference to this property, then whatever binding effect they might have on the company, so far as the property was concerned, would redound to the benefit of the owner of the property, or at least to the party that was actually insured against loss by insurance of the property. So, if the matter is true in this case, that there were such acts or declarations, or transactions of the adjuster in reference to the property, then M. J. M. can claim the benefit of that, just as if she had been the actual party with whom the adjuster was dealing at the time.[39]

§ 1181. House Falling Over—Fire Commencing at the Time or After its Fall. (a) The court instructs you that, even though you may believe from the evidence that the plaintiff's building, which was insured by the defendant, was blown from its blocks by the wind and turned over on its side, yet if you further believe from the evidence that said building remained intact and retained its identity as a building, then and in such case the said building did not fall within the meaning of the clause in defendant's policy of

39—Montgomery v. Del. Ins. Co., 67 S. C. 399, 45 S. E. 934 (936), 100 Am. St. Rep. 750.

"J. D. M. testified that he made proof of loss and brought action in his own name, because informed by the agent of defendant that the only record of any insurance of this property was on what is known as the 'register' and 'that was in my name,' that he never claimed the property in his own name, except as he was made to do in the proof of loss; and that he claimed it was his wife's property from the time he bought it. With this testimony before the court, the defendant cannot complain that the judge instructed the jury that the former action might be a bar to this action if it had gone into final judgment, but not otherwise. Bigelow Estoppel (2d Ed.) pp. 24, 25; Freeman on Judg. §§ 261, 262. If, through the agent's mistake and without fault on the part of J. D. M., entry was made on the register of the husband's name instead of the wife's, and the husband thereafter thought it necessary, by reason of this erroneous entry, to make proof of loss and bring action in his own name, and afterwards, upon further advice, discontinued such action before judgment entered, we do not think that such proof of loss and action instituted would estop the wife from claiming the insurance money in an action afterwards instituted in her own name. And at the time, and under the same circumstances, we think that the declarations and acts of the company's authorized agents made to the husband in his own person in relation to the property insured, while he was in fact acting as to this same property in the interest of his wife, the real owner, would be as binding upon the company as if made to the wife. There was testimony on all these matters—whether established as facts, was left to the jury."

insurance, providing that if said building, or any part thereof, should fall, except as a result of fire, all insurance by said policy on such building or its contents should immediately cease.

(b) Before it can be held that the plaintiff's house had fallen, you must find from the evidence that his house had fallen to pieces, and was not left intact as a building after it had been blown from its foundation or posts upon which it was standing before the storm.[40]

§ 1182. **If Jury Cannot Find Market Value of Goods Destroyed, Should Find for Defendant.** If the jury believe from the evidence that any wine, whisky, brandy, beer, tobacco, cigars, or other merchandise was destroyed, then it will be for the jury to find from the evidence how much of such liquors or other merchandise was destroyed and the market value thereof; and if the jury cannot find from the evidence the market value of the liquors or merchandise destroyed, then they cannot find for the plaintiff as to such liquors or merchandise.[41]

§ 1183. **Burden of Proof on Plaintiff to Prove Items of Property or Showing Waiver.** (a) The burden is upon the plaintiff to satisfy you of what was there. You are to say whether there was there at the time of the fire the items of property which are described in plaintiff's proof of loss. If they were there, then, of course, he would be entitled to recover of this insurance company the value of the property which was thus found upon the premises at the time of the fire.[42]

(b) The court instructs the jury that the burden of showing a waiver of the condition requiring action to be commenced within six months after the fire occurred is on the plaintiffs, and they must

40—Teutonia Ins. Co. v. Bonner, 81 Ill. App. 231 (234).

"We are of the opinion that to hold that a well constructed frame building has fallen, when it has merely been blown from blocks on which it rested, and turned over on its side, remaining intact and retaining its identity as the same building, would be to give to the word 'fall' its most ext ed meaning in favor of forfeiture, when, under such circumstances, we should give it the most restricted meaning consistent with reason, would be to give to it a more extended meaning than writers on insurance law usually have given to it. Therefore we hold that appellant's exceptions to the action of the trial court in the giving . . . of the instruction complained of are not well taken. We are also of opinion that even if it could be held under the facts of this case that as shown by the evidence that the building had fallen within the proper meaning of the term 'fall' as used in said clause of the policy, still, if it had caught fire before it fell, or was in process of being consumed when it fell, the fact that it did fall while being so consumed, though from other causes than the fire, would not bar a recovery."

41—Manchester F. A. Co. v. Feibelman, 118 Ala. 308, 23 So. 759 (762).

"This was a proper charge and should have been given. If there was no evidence upon which the jury could satisfactorily base a finding as to the value of the property mentioned, then it would follow, that they could not find for the plaintiff as to such property."

42—McCoubrey v. German-Am. Ins. Co., 177 Mass. 327, 58 N. E 1080.

show the same by a preponderance of the evidence, or they cannot recover in this action.[43]

§ 1184. **Burden of Proof on Defendant Charging Plaintiff with Destroying Building—Preponderance of Evidence.** Now upon that issue, upon that defense, the defendant here has the affirmative, and must satisfy you by a preponderance of the evidence that this plaintiff either directly or indirectly caused the destruction of that building by fire, in order to entitle it to the defense it has set up. I have so often explained to you what the preponderance of evidence is in such cases that I do not deem it necessary to dwell upon it here.[44]

§ 1185. **Fire Insurance—False Statements in Procuring Policy—Arson—Cash Value—Rule of Damages—Series.** (a) If B. or K., or either of them, knowingly made to the agents of the insurance companies a false and fraudulent statement of the value of the property to be insured, in order to procure the insurance, then the plaintiff cannot recover, and you should find for the defendants; but a misstatement of such value made in good faith, believing the same to be true, would not avoid the insurance.

(b) If B. in the proofs of loss knowingly made a false and fraudulent statement of the value of the property destroyed by fire, then he cannot recover; but a misstatement of such value made in good faith, believing the same to be true, will not avoid the policy.

(c) If B. and K. or either of them, set fire to and burned the property insured, or intentionally caused the same to be done, the plaintiff cannot recover.

(d) If B. and K., or either of them, made any false and fraudulent statement as to matters of fact material to the risk to the agents of the insurance companies, or fraudulently suppressed any matter of fact material to the risk, in order to procure the insurance, then in such case the plaintiff cannot recover; but the mere omission to state that the stock was second-hand, or that they had bought it at a discount of forty-eight per cent., would not be sufficient to avoid the insurance, unless the same was done with intent to defraud.

(e) By "cash value" is meant the cash market value at the time and place where the property was situated, and where the fire

43—"We are of the opinion that the rules of law involved here were correctly given."

Allemania F. Ins. Co. v. Peck et al., 133 Ill. 220 (227), 24 N. E. 538, 23 Am. St. Rep. 610.

44—Schornak v. St. Paul F. & M. Ins. Co., 96 Minn. 299, 104 N. W. 1087 (1088).

"Exception was taken to this charge, upon the ground that the court did not inform the jury what it meant by 'a preponderance of the evidence.' There was no error in this respect, for it must be assumed that the jury understood what the court meant by a preponderance of the evidence, and, if counsel for appellant was not satisfied on that point, it was his duty to call special attention to it under the rule in Steinbauer v. Stone, 85 Minn. 274, 88 N. W. 784, and Applebee v. Perry, 87 Minn. 242, 91 N. W. 893."

occurred, if there was such market value. If there was no such market value there, then the cash value in the nearest adjacent markets, or, if that is not shown, then the intrinsic value of the property. In determining the cash market value at the time and place where the fire occurred, you may consider the intrinsic value of the property; what value, if any, it had in other adjacent markets; the ease or difficulty of transporting it from place to place; the demand, or lack of it, for such property; that it was second-hand, if it was such; the deterioration, if any, from value at first hand; the price paid for it by plaintiff by K.; the opinion of witnesses who knew the market or other value, if such are in evidence; and all other facts and circumstances in evidence tending to show value. Prospective and unrealized profits are not to be taken into consideration, but realized profits may be taken into consideration.

(f) If you find for the plaintiff, you will ascertain the actual cash value of the stock destroyed, take three-fourths of it, and divide that equally between the two policies; but in no event can you find against the defendants more than two thousand dollars each, exclusive of interest, no matter what the value of the property.[45]

§ 1186. Insurance Contract—Floater Policy—Series. (a) In measuring the value of testimony in this case, and in all cases, it is important to keep in view certain leading ideas that help you to measure the force of the testimony. In some cases the testimony, perhaps all of the way through, may be truthful, or some witnesses may be mistaken, and innocently mistaken. You may fail to believe their testimony, or rather fail to give credence or weight to it on the ground that you believe that they are innocently mistaken—simply mistaken. On the other hand, you may fail to give value to the testimony because you may believe it bears the impress of perjury. Another thought is that the manner and appearance of witnesses upon the stand may help you to some extent to determine the value of the testimony. So that the testimony in a case of some witnesses may be as genuine as a standard coin; of others it may be as worthless as a counterfeit. It may measure up to par, or be absolutely worthless. Some of it may impress you as being simply of witnesses who did not intend to testify falsely or who perhaps were careless, or whose memory as to the facts was wrong.

(b) Coming, then, to this case, with these suggestions in measuring the testimony, the main turning point is the question whether there was a contract executed here which bound these insurance companies to pay the insurance. There is no contest as to the amount of the loss, and no contradiction of the testimony showing exactly what the loss was. There is no dispute that proofs of loss were sent. But the fact that there was a loss, and the fact that

45—German-Am. Ins. Co. v. Brown, 75 Ark. 251, 87 S. W. 135 (136).

proofs of loss were sent in, does not make a contract. I cannot compel you to pay a loss, arising from fire or from any other source other than a tort, where you do a willful wrong or injury. I cannot compel you to pay the same, based on a contract, simply because I claim it. If you dispute my right, or deny that there was any contract between us, the burden is upon me to show that contract and establish it by the weight of the evidence. So here, when the plaintiff, the Art Syndicate, comes along with claims based upon contracts which the company alleges were made with these insurance companies, and the insurance companies contest the point that there were contracts, the burden is upon the plaintiff to satisfy you, by the weight of the evidence, that there was a contract. A contract for what? A contract covering ceramic art goods located we will say at Atlantic City; perhaps not necessarily there, because if the testimony is to be believed, it was, substantially, that a floater policy, which it is alleged was the kind of policy contracted for here, is just what the term "floater" means—floating about from point to point. I may not exactly recall the cities; but, as illustrating the manner of their business, there was some testimony that in three months they exhibited at perhaps Chicago, Cleveland, Boston, New York, and Pittsburg. So that a floater meant a policy that floated around with these goods, and insured them to the extent that the understanding of the parties agreed they should be insured. Now, was there a contract made? If there was no contract, no binding agreements between these parties, that is the end of the plaintiff's case. The plaintiff must show a contract which binds the defendants. It is for you to determine whether there was a contract, and, if so, what it was.

(c) It is alleged by the plaintiff that it was a floater policy, and the meaning of that I think is quite clear from the testimony. These policies were policies to the extent of $5,000. There is some dispute as to whether the goods were to be in Atlantic City. Probably, within the fair atmosphere of all the testimony, the policy was intended to be—but that is for you to say—a floater policy covering Atlantic City, to run a year at the rate of 3 per cent., and covering any other points within the express arrangement of the parties, if there was an express, definite arrangement made. It takes three links to make the contract. Two out of the three will not make it. All of the links must be established. If it is clear that the first link in the contract is established, that the minds of these two agents met, and it was clearly understood to be a floater policy to the extent of $——, covering ceramic art goods, and then if it is clear that that meant a floater policy, wherever the goods might be, that part of the link would be established, unless the expression, "wherever they might be," was qualified by some other definite arrangement. If it was definitely understood between them that while it was to be a floater policy, which meant floating from

point to point, the insurance was not to cover every place that these goods might float or be placed, but was only to cover, say, the best hotels, or high-class hotels, and railroad depots; if that is all, even if their minds met to that extent, that is the second point in the case. If they were to cover simply those points, then there could be no recovery in this case, because stores, no matter how good they were, were not part of the arrangement. If the arrangement was generally to cover hotels, depots, and good stores, and if this was a fairly good store, which, perhaps, cannot very well be disputed, then the policy would cover the store. If it did not cover the store, in the sense that the parties agreed, if they agreed at all, but simply covered railroad stations or depots and good hotels, then, of course, the plaintiff cannot recover. Then another step or link which would be essential, even if it is all established up to that point, is what were the terms of payment? The rate was 3 per cent. That cannot be disputed, and if the testimony of Mr. H. is to be believed it was to cover a year. It is asserted here, as a principle of law, that because the premium was not actually paid at the time there could be no recovery. That might, or might not, be a good proposition; but, leaving that out of the case, as not for your consideration, we have a set of facts which settle that question, if you believe the testimony.

(d) On the question of payment, within the general scope and method in which these two agents did business with each other, there is testimony that L. & Bro. and Mr. H., in the interchange of business, amounting sometimes, as Mr. H. says, to nine or ten policies a day, and in the hurry of business necessarily, and in accordance with the general custom of all the insurance agents in the City of P. credit was extended, in the sense of running accounts, perhaps as a clearing house would run and clear at the end of 20 or 30 days, or whatever the custom was as between L. & Bro. and Mr. H., to settle the balance as shown by the contra accounts, whatever business L. & Bro. had charged against H. would be summed up in an account, whatever business H. had against L. & Bro. would be summed up, and the difference between the two accounts would represent the cash balance due from one to the other, and then a settlement would be made and the cash paid. If it is true that there was this general custom, not only between these two parties, but generally among the agencies here insurance agents, to run a line of credit and conduct the business in that way, then it is fair to imply that this transaction, being one of perhaps dozens had between the parties, went into the account in that way, and therefore it was a sufficient contract, as to that link, and bound these companies. Mr. L., of L. & Bro., who represented these insurance companies, testifies that the contract was not closed. Of course you are to take your own recollection, and from that point of view weigh the value of the testimony; but I believe Mr. L.'s testimony is that

Mr. H. came to see him, and there is no dispute about that. There was some talk about a floater policy, and Mr. L. said to him that he would like to know where these goods were. Mr. H. replied that he was not sure, but he judged they were at Atlantic City, because the telegram came from there. Mr. L.'s testimony is that he refused to bind himself, refused to make a contract, unless the location of the property in the floater policy was limited to railroad depots or stations, and high-class, or first-class, or best hotels. Now, if that story is true, if that is exactly what he agreed to do, and to that extent he was willing to make a contract, he would be bound only to that extent. If the contract did not include stores, then there was no contract as to stores, and, of course, these companies would not be liable, and the plaintiff could not recover.

(e) Then there is a letter that is important here. Mr. H. said, in chief, when he was on the stand, that he made an absolute contract; that is, he made a closed contract with Mr. L., not a contract that was subject to any restrictions, not a contract subject to any condition which left the actual full contract open, to be settled afterwards, but that he made a full contract. Mr. L. denies that. Is Mr. H. supported in his allegations that, at the time he alleges the contract was made, it was actually made, a completed full contract, contracting all of the essential links that bound the parties. Is that true? It is for you to judge, to some extent, as to that, from the letter which Mr. H. subsequently wrote to Mr. G., who is now dead, but who was the president of the plaintiff company at that time. Mr. H. wrote Mr. G. on April 1, 1902, after he had this alleged conversation with Mr. L.: "We wired you this morning in reply to your telegram as follows: $5,000 covered, subject to condition, particulars by mail'—which we now beg to confirm." The condition referred to is "that it will be absolutely necessary to incorporate the full coinsurance clause in the firm in order to get the company to accept the floater business." Now, if his testimony in the first instance was, regardless of this letter, that he had actually made a full contract, complete in all its term, clearly understood by all of the parties, and binding upon the parties, why did he write this letter? The condition referred to is that it will be absolutely necessary to incorporate the full coinsurance clause in the form. Absolutely necessary to do that in order to do what? In order to get the company to accept the floater business. From that would you, or would you not, infer that he had not completed his contract? If you infer that he had not completed his contract with Mr. L., that the terms were not all fully agreed upon, that there were still something to be done—if that is the true interpretation—there could be no recovery here by the plaintiff, and your verdict for the defendant. If the completion of the contract depended upon Mr. G.'s wiring or writing back in reply to this letter, "That is entirely satisfactory, you may close the contract," there

never was any telegram and never was any letter back from Mr. G., prior to the fire, stating he was satisfied to add the coinsurance clause and therefore close the contract. Not having done that, the contract, not having been closed prior to the fire, the defendant would be entitled to a verdict.

(f) I do not know that there is anything more to say, gentlemen, unless we have overlooked something. If there is anything counsel would like to have us call the attention of the jury to, we would be glad to do it. In a general way, and by way of repetition, it is for you to say whether there was a completed contract, completed in the sense that there was no condition attached to it, completed in the sense that Mr. L. and Mr. H. met and talked about it, and agreed that the insurance should be placed, and should be placed in the sense that it was absolutely binding and fixed, and no condition whatever attached to it, and that it covered the goods, in the floater sense, in stores. As before stated, even if the minds of the parties met upon a contract, and that contract did not cover stores, but did cover railroad depots and good hotels, these insurance companies would not have to pay. If they did not contract in their floater arrangement to cover stores, it does not matter how good the stores were, or where they were, they would not be bound to pay. If the contract was to cover merely railroad stations, goods in transit and in good hotels, then that is what the parties agreed upon and are bound by.[46]

46—The above oral charge to the jury was approved in Grossbaum Ceramic Art Syndicate v. German Ins. Co., 213 Pa. 506, 62 Atl. 1107.

CHAPTER LV.

INSURANCE—LIFE.

See Erroneous Instructions, same chapter head, Vol. III.

Note. As many of the principles of life insurance are applicable to fire insurance, and vice versa, this and the preceding chapter on fire insurance should be consulted.

§ 1187. Must Furnish Proofs of Death Before Suit is Begun—Company to Furnish Blanks. (a) The jury are instructed that the furnishing of satisfactory proofs of death of the insured is a

condition precedent to the right to bring and maintain an action on the policy of insurance herein sued upon, and it devolves upon the plaintiff to prove, by a preponderance of the evidence, that such proofs were furnished to F. L. A., one of the constituent corporations, before this suit was begun.[1]

(b) Under the stipulations in the policy, defendant, upon receiving notice of the death of the insured, was to use reasonable diligence in furnishing the beneficiary or her agent proper blank forms upon which to make proofs of death; that, under the policy which provided that proofs should be made out upon forms to be furnished by the insurer, it was incumbent on defendant to do more than inclose such blanks in an envelope duly addressed and properly stamped, and to deposit the same in the post office at Minneapolis, but it must actually deliver such forms to the agent or the plaintiff or her agent, using all reasonable diligence to accomplish that end. Further, that, upon receipt by defendant of notice of the death of the insured on or before the —— day of ———, it did, in compliance with a request for the blanks, mail the same to plaintiff, but that such forms were never received by the beneficiary or her agent.[2]

§ 1188. Conditions in Application and Policy, Amounting to Warranty. If the jury believe from the evidence that the policy in suit was issued upon an application containing the following provision: "I hereby apply for insurance for the amount herein named, and I declare and warrant that the answers to the above questions are complete and true, and were written opposite the respective questions by me, or strictly in accordance with my directions. I agree that said answers with this declaration shall form the basis of a contract of insurance between me and the P. I. Company of America, and that the policy which may be granted by the company in pursuance of this application, shall be accepted subject to the conditions and agreements contained in such policy. I further agree that no obligation shall exist against said company on account of this application, although I may have paid premiums thereon, unless said company shall issue a policy in pursuance thereof and the same is delivered to me"—then the court instructs the jury as a matter of law, that by virtue of said provision, each and every answer in said application was warranted to be true, and if the jury believe from the evidence that any answer in the said application was not true, then the court instructs the jury that they must find for the defendant.[3]

1—Franklin Life Ins. Co. v. Hickson, 197 Ill. 117 (119), 64 N. E. 248.

2—Robinson v. Northwestern Nat. Ins. Co., 92 Minn. 30, 100 N. W. 226 (227).

3—Prudential Ins. Co. v. Fredericks, 41 Ill. App. 419 (421 and 422). "By accepting the policy and paying premiums upon it, whether that was done by the assured or by one acting for him, whether by his authority or as a volunteer, the assured and his administratrix, now representing him, have adopted the policy as it reads, with the same effect, as if he had intelligently

§ 1189. **Misrepresentation as to Occupation—Knowledge of Agent.** (a) If the jury believe from the evidence that McC. was the agent of the defendant at the time of taking and soliciting the application of W. for a policy of insurance in defendant company, and that said agent was truly informed of the occupation of said W., and that the defendant was informed as is shown by the application, that said W. had no intention of changing his occupation, and that said defendant, with such knowledge issued and delivered the policy sued on to said W., it is for you to decide from the evidence whether or not the defendant waived that provision contained in said application where it states that the applicant agrees not to engage in any specially hazardous occupation; and if you find from the evidence that the defendant company did waive said provision in said contract, it is now estopped from setting up a breach of such promise as a defense to this action.

(b) If the jury believe from the evidence that the defendant with a full knowledge of the facts upon which it now disputes the validity of the policy sued on, issued and delivered said policy to W. during his life and continuance in good health, it is now estopped from setting up such facts as grounds for avoidance of the payment of said policy.[4]

§ 1190. **Questions and Answers in the Applications do Not Concern Disorders or Ailments Lasting Only for Brief Periods.** The court instructs the jury that the questions and answers contained in the applications mentioned herein do not concern accidental disorders or ailments lasting only for brief periods, and unattended by any substantial injuries or inconveniences, and do not relate to a slight and temporary indisposition speedily forgotten, but apply only to matters of a substantial character, and of such a nature as to affect the hazard risks incurred or assumed by reason of the issuance of the policy of insurance mentioned herein.[5]

§ 1191. **Waiving Errors, in Application for Reinstatement, After Death.** The jury is instructed that if they believe, from the evidence, that soon after the death of J. the plaintiff called at the

answered each question and signed his name to the application. He and his representative must adopt the whole or none of the complete transaction. It is only by adopting the policy that the appellee has any standing, and such adoption necessarily embraces all the terms of the policy. Draper v. Charter Oak, 2 Allen (Mass.) 569; Richardson v. Maine Ins. Co., 46 Me. 394, 74 Am. Dec. 459; Goddard v. Monitor Ins. Co., 108 Mass. 56, 11 Am. Rep. 307."

4—Triple L. Mut. Ind. Ass'n v. Williams, 121 Ala. 138, 26 So. 19 (25), 77 Am. St. Rep. 34.

5—Ill. L. Ins. Co. v. Lindley, 110 Ill. App. 161 (163-4).

"This instruction is not an incorrect statement of the law of the case for the reason that the main question in the application is: 'Have you ever had any of the following diseases?' That this construction accords with the general trend of authorities is shown by Masonic Ben. Soc. v. Winthrop, 85 Ill. 542; Drew v. Continental L. D. Co. 24 Fed. Rep. 620; Fidelity Mut. L. Assn. v. Miller, 34 C. C. A. 211. 92 Fed. Rep. 719; Cushman v. U. S. L. Ins. Co., 70 N. Y. 72; Conn. L.

general offices of the defendant company in the city of C. and there informed M., the president of the defendant insurance company, of the real facts in relation to the sickness and condition of health of J. on and prior to the —— day of ———, and that the said J. had consulted and been treated by physicians prior to that time, and said M., president of said company, after he knew all of said facts, informed the plaintiff that if she would make out or cause to be made, proofs and certificates of the death of said J., and present the same to said defendant company, that said policy would be paid, and that the plaintiff, relying upon said statements, thereafter at trouble and expense to her, if any there was, caused proofs and certificates of death to be prepared and presented to the defendant company, which said proofs and certificates were accepted and retained by said company and its officers, the defendant thereby waived its right to insist upon the policy being void because of misrepresentations contained in the application for reinstatement.[6]

§ 1192. Suffering from an Ailment at the Time of Delivery of the Policy—Failure to Communicate it to the Company is Fraudulent. (a) If at the time of the delivery of the policy in suit to the decedent, M. was suffering from an ailment which, if known to the defendant, would have caused the rejection of the risk, or the exaction of a higher rate of premium, then the failure to communicate it to the company was a fraud upon the company; it is not bound, and the verdict should be for the defendant.

(b) If M., the deceased, spat blood or had an habitual cough, or if she had a physician attending her for lung trouble, before the application for the policy in suit was made, then there can be no recovery, and the verdict should be for the defendant. If she had these troubles, they were material to the risk, and if she made false representations on that subject, the policy is void, and the verdict should be for the defendant. An "habitual cough" does not mean a cough contracted from a cold. It does mean a cough that comes on at times. It means a cough that is the normal condition of the patient; a cough that is chronic; a cough that has become a habit.

Ins. Co. v. Union Tr. Co., 112 U. S. 250, 5 S. Ct. 119."

6—Traders Mut. L. Ins. Co. v. Johnson, 200 Ill. 359 (362-3), affg. Triple L. L. Ins. Co. v. Johnson, 101 Ill. App. 559, 65 N. E. 634.

"If the appellee, after the death of the assured, advised the appellant company fully as to all the facts with relation to the alleged false representations and fraud in the application for the reinstatement of the assured, upon which rested the alleged right to declare a forfeiture of the policy, and the appellant company did not then insist on a forfeiture, but recognized the continued validity of the policy by requiring the appellee to go to the trouble and expense, if any, of preparing proof of the death of the assured and of other facts connected with the loss, an intention to waive the forfeiture or breach of warranty contained in the application for re-instatement would follow as a legal result. German Fire Ins. Co. v. Grunert, 112 Ill. 68; Supreme Tent K. of M. v Wolkert, 57 N. E. Rep. 203; Titus v. Ins. Co., 81 N. Y. 410; Cannon v. Home Ins. Co., 53 Wis. 585, 11 N. W. 11; 1 Am. & Eng. Ency. of Law (2nd ed.) 938, 941; Joyce on Ins. sec. 586."

It does not mean a cough that a person has when they have a cold, but an habitual cough is what is referred to. The evidence upon that subject will be for you.[7]

§ 1193. **Jury to Judge of Nature of Sickness—Falsehood—Burden of Proof.** It is for you to determine the extent of the injury received by T., and whether it was of such a character or nature as to make his reply to the interrogatories a falsehood or not. It is for the jury to say from the evidence, in regard to the extent, nature, and kind of sickness, whether the attack which the insured suffered from was of a character to make his answer "never sick" a falsehood. The burden of proof is on the defendant. The company sets up the defense, and the jury must be satisfied from the evidence that the untruth of the statement has been established, otherwise their verdict should be for the plaintiff.[8]

§ 1194. **Concealing State of Health.** If, at the time of the delivery of the policy in suit, the decedent, M., was suffering from phthisis pulmonalis, tuberculosis, or consumption, which afterwards contributed to her death, then she was not at the time of the delivery of the policy in suit in sound health, as required by the provisions thereof, and your verdict should be for the defendant. If you find that she had any of these diseases, the evidence is for you; and if she knew it, and concealed it when she was asked to reveal it, this point is affirmed. Those questions would be material to the risk.[9]

§ 1195. **Brother Dying of Consumption—Misrepresentation by Insured or Beneficiary.** The court instructs you that if Mrs. D., the mother of the insured, and one of the joint beneficiaries in the policy, was present when the application was made and stated, or caused her son to state, that his brother died of malarial fever, when, as a matter of fact, he died of consumption, then, if such statement was adopted by the insured and relied on by the company it was material to the risk, and the son, soon thereafter dying of consumption, it would avoid the policy, whether the incorrect statements were made intentionally, or through mistake and in good faith, and there could be no recovery. If she helped her son make the answers it was her duty as well as his, in the utmost good faith, to disclose fully and truthfully in answer to questions all that either of them knew about the health of the applicant, his exposure to a contagious or infectious disease, and what his brother died of, and if they, or either of them, misstated or concealed the fact that the brother, some time before, died of consumption, and the insured, a short time after died of consumption, then the court charges that such misstatement or concealment was a fact material to the risk.

7—March v. Met. L. Ins. Co., 186 Pa. 629, 40 Atl. 1100 (1101), 65 Am. St. Rep. 887.

8—Knickerbocker L. Ins. Co. v. Trefz, 104 U. S. 197 (205).

9—March v. Met. L. Ins. Co., 186

and avoided the policy, whether intentionally made, or made through mistake, and the verdict must be for defendant.[10]

§ 1196. **Becoming Sick After Application and Before Delivery of Policy.** If the applicant, H., had fulfilled all of the requirements entitling him to a certificate, and the B. U. had failed to deliver the certificate of insurance after it had been issued, and the applicant, H., had then become sick, and was entitled to the policy or certificate of insurance upon the payment of his assessments or dues, the company was liable, whether the certificate had been delivered or not, if the said H. was in good health at the time of the examination by the company's medical examiner and the date of the policy of insurance.[11]

§ 1197. **Delivery of Certificate by Agent of Company Knowing Insured to Be Sick at the Time is a Waiver of Legal Right Arising Out of Such Sickness.** The delivery of the certificate of policy of insurance, whether the party were sick or not, if done by the agents of the defendant, was a waiver of any representation of the deceased; and the receipt of the dues by the agents of the B. Union was an acknowledgment that the deceased, H., was a member of the order, and entitled to all of its benefits under the policy; provided that the agent of the defendant knew at the time of the delivery of the certificate or policy of insurance that the party was sick, and delivered the policy, then it would be a waiver. A waiver implies the idea that one has a right, and, with knowledge of his rights and that which might defeat his rights, does an act by which he waives the right to stand upon his legal position or his legal right.[12]

§ 1198. **Habitual Drunkard—Question for Jury.** (a) I think that there is no rule of law which says that, in order to make a man a drunkard, he must drink every day or every week to excess. Neither, on the other hand, does a single or an occasional excess make man an habitual drunkard; but, if you find that the habit and rule of a man's life is to indulge periodically and with frequency, and with increasing frequency and violence, in excessive fits of intemperance such a use of liquor may properly cause the finding of habitual drunkenness. It is the fact of the certainty of these periodical sprees, accompanied with their frequency, which marks the habit. If a man should indulge in such a debauch once in a year only, it could not, in my opinion, properly be said that he was an habitual drunkard; he would be an occasional drunkard.

Pa. 629, 40 Atl. 1100 (1101), 65 Am. St. Rep. 887.

10—Supreme Lodge K. of H. v. Dickson, 102 Tenn. 255, 52 S. W. 862 (864).

"This was stating the case as contended for by defendant, and, as we think, too strongly, specially as to matters about which the statements must necessarily be mere opinions; but there is certainly nothing of which defendant can complain, as it was putting the case on his theory."

11—Hollings v. Bankers' Union, 63 S. C. 192, 41 S. E. 90 (92).

12—Hollings v. Bankers' Union, supra.

But if such debauches increase in frequency, and the certainty of their increasing frequency becomes established, then the time finally arrives when the line between an occasional excess and habit is crossed. It is for you to say whether C. was at the time of the application, or became afterward, the victim of such a habit.

(b) If you find that, after the making of the policy, C. became so far intemperate as to impair his health, the policy is avoided, and the verdict will be for the defendant.[13]

§ 1199. **Strong Drinks Taken for Medicinal Purposes.** (a) If the jury should believe that the efficient controlling cause of the death of D. was the excessive and continuous use of strong drinks for several days and nights immediately preceding his death, yet if they believe that it was taken in good faith for medicinal purposes under medical advice, such use was not a violation of that condition of the policy which declares that it shall be null and void if he shall become so far intemperate as to impair his health or induce delirium tremens.

(b) Whether the health of D. was impaired by the use of alcoholic stimulants not taken in good faith for medicinal purposes or under medical advice, is a matter to be determined by the jury under all the evidence.

(c) If the testimony does not so satisfy you, that D. became so intemperate in the use of alcoholic spirits as to impair his health, or that at A., in ———, he indulged in the use of alcoholic liquor to such an extent as to induce delirium tremens, or, if you are convinced that all the liquor which he used was used in good faith, under medical advice and for medicinal purposes, as claimed by the plaintiff, then your verdict should be for the plaintiff.

(d) It is in evidence that D. did take alcoholic stimulants under medical advice. If his taking them was only under such advice and only in such quantities as prescribed by his physician, even if impairment of health followed, yet the policy would not become void. If from all the testimony in this case you conclude that D.'s condition in this respect was produced by a strict, fair and bona fide following of Dr. K.'s prescription, then that impairment of health, if there was any, which it is alleged existed, known as cirrhosis of the liver, does not avoid this policy.

(e) That prescription was, as Mrs. D. gives it to us, to take an egg with sherry wine in the morning and a milk punch before retiring at night, and brandy and water, if he needed it, during the day. I leave it entirely with you to say, whether, if you believe the witnesses of the defendant and some of the witnesses for the plaintiff as to the habit of D. in the use of intoxicating liquor for many years prior to his death, you can conscientiously say that

13—N. W. L. Ins. Co. v. Muskegon Bank, 122 U. S. 501 (507), 7 S. Ct. 1221.

such was a bona fide following of medical advice; otherwise the condition is broken if impairment of health follows.[14]

§ 1200. **Tender of Premium—Agency.** (a) If the jury should find that an agent of an insurance company is duly authorized by the company to accept the payment of a premium, and if the payment is offered to him, then he has the power to bind the company so far as to prevent the forefeiture of the policy if he declines to receive it, or directs that the payment shall be made at a future time upon the return of the policies to be rewritten, as indicated by the proof in this case they were to be rewritten according to an agreement of the parties.

(b) I charge the jury as the law that if he (F.) had authority from the company to receive these premiums, and if the premium was offered to him, and if he directed that the payment should be withheld until the policy had been rewritten and returned, and if the death occurred before that was done, then that would be binding upon the company so far as to prevent the forfeiture of the policy.[15]

§ 1201. **Giving Note for Premium—Retention of Policy by Applicant Waiver of Fraud.** It appears that the defendant received a policy of insurance, or a bond, as it is called, from the plaintiff, in response to this application which she had signed, and in payment of the premium for which the note in question is claimed to have been given. It was the duty of the defendant on receiving this policy, if she believed it was obtained by fraud, to have either returned the policy to the company, notifying the company or its agent that she would not accept the policy, and to do this within a reasonable time after receiving it, or within a reasonable time after learning of the fraud she claimed was practiced upon her. This question is, in a sense, independent of whether or not the defendant was induced to sign the note by misrepresentation on the part of the agent. That is to say, if you should find that the defendant signed the note by reason of some fraud practiced upon her in the manner she claims, still, it appearing that this application was sent in to the company, and the policy sent to the defendant, which she retained, under all the evidence in the case, it has appeared in the evidence, she retained it an unreasonable length of time, or failed for an unreasonable length of time to notify the company or its agent that she repudiated the transaction and would not be bound by the note, then such retention of the policy without complaint would be a waiver of any fraud she claimed and would bind her to pay the note.[16]

§ 1202. **Cancellation of Policy—Notice—Return of Premium.** I have been requested to instruct you that if, at the time the policy

14—This charge approved in Ætna L. Ins. Co. v. Ward, 140 U. S. 76 (84), 11 S. Ct. 720.

15—U. S. L. Ins. Co. v. Lesser, 126 Ala. 568, 28 So. 646 (648).

16—National Life & T. Co. v.

of insurance is canceled, the insurer returns to the insured the last premium paid by him, along with a notice of such cancellation, the insured does not by retaining such premium acquiesce in the revocation and cancellation of the policy. Well, gentlemen, that is substantially correct. I hesitate to charge it in the exact language it is, because I am not allowed to charge upon the facts. But the statement here, that the policy of insurance is canceled, and the premium returned with a notice of such cancellation, the assured does not by retaining such premium acquiesce in the revocation and cancellation of the policy, that is a question of fact for you. But as a question of law, a contract of insurance is like any other contract. Whether it is canceled, or not canceled, is a question of fact for the jury to pass upon.[17]

§ 1203. **Abandonment of Rights Under the Policy.** If you find, from the evidence, that the letter of R. dated ———, and the transactions and mutual understanding of the parties in connection with its signing and delivery, constituted an abandonment by R. of all rights on the part of R. which had in the past or might in the future accrue to him by reason of the Braun insurance matter, then you will find the issues for the defendant.[18]

§ 1204. **Accident Insurance—Proof of Accidental Death—Suicide.** The jury are instructed that, in order for the plaintiff to recover, it is not necessary that she should show by direct evidence that the particular and specific cause of the death of W., provided you believe from the evidence and the facts and circumstances in evidence that his death was produced either by drowning or by a fatal wound in the head, or by a combination of both of these causes, and provided you further find that W. did not commit suicide and was not insane at the time of his death.[19]

§ 1205. **Assignment of a Life Insurance Policy—Series.** (a) The court instructs the jury that the rule of law was annexed, and still attaches to all other kinds of choses in action, such as policies of insurance, or non-negotiable papers, like a bond for the payment of money. A man may assign or transfer these articles, may sell them outright, or may assign them conditionally as he sees fit, but the rule of law attaches that whenever he does assign or transfer them upon a condition, or reserving to himself any equity or right

Omans, 137 Mich. 365, 100 N. W. 595.

17—Thompson v. Family Pro. U., 66 S. C. 459, 45 S. E. 19 (20).

"The assignment of error in the exception is that the presiding judge expressed an opinion upon the facts of the jury. By reference to the foregoing it will be seen that the facts were entirely submitted for determination by the jury without comment upon them by the judge. This exception is overruled."

18—N. Y. L. Ins. Co. v. Rilling, 219 Ill. 72 (74), 76 N. E. 73.

19—Fidelity & Cas. Co. v. Weise, 80 Ill. App. 499 (508). Case reversed in 182 Ill. 496, 55 N. E. 540, for error in another instruction on the burden of proof.

in it, any person who subsequently takes it, takes it subject to that equity or right which the original assignor retains in himself.

(b) If the jury believe that this policy of insurance was valid in its inception, then, even if A. and R. had agreed between themselves that the assignment to R. should not be absolute, but that A. should retain some equity in the policy nevertheless, if A. executed the assignment to R. dated ———, which I have instructed you would be on its face an absolute assignment and delivered the policy so assigned to R., and the defendant herein was not advised of the said agreement, or put on inquiry concerning the same, and by reason thereof on the faith of the said policy and assignment, he was led into dealing with the apparent owner, the defendant will be protected, and both A. and the plaintiff, who is in law legally his privy, are estopped from setting up said agreement.

(c) It is now a well-established principle that when the true owner of property holds out another, or allows him to appear as the owner of, or as having full power of disposition over, the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they have directly dealt, but they are derived from the act of the real owner, which precludes him from disputing, as against such third party, the existence of the right or power which he caused or allowed to appear to be vested in the party making the sale, and if such third party should agree to indulge such apparent owner, if his debtor generally, and does so indulge him for a reasonable time, and receives the property as security, then the owner and his privies are estopped from repudiating the transaction.

(d) If the jury believe that this policy of insurance was valid in its inception, then, even if A. and R. had agreed between themselves that the assignment to R. should not be absolute, but that A. should retain some equity in the policy, nevertheless, if A. executed the assignment to R. dated ————, which I have instructed you would be on its face an absolute assignment and delivered the policy so assigned to R. and A. had notice from R. that he intended to use this policy so assigned for the purpose of pledging the same to S., for a valuable consideration and remained quiescent for the purpose of allowing R. to use said policy as his absolute property, and keep from the knowledge of S. any latent equities existing therein, and defendant herein was not advised of the said agreement or out on inquiry concerning the same and by reason thereof, on the faith of the said policy and assignment, he was led into dealing with the apparent owner the defendant will be protected, and both A. and the plaintiff who is in law, legally his privy, are estopped from setting up said agreement.

(e) The jury is instructed that a policy of insurance is what is termed in law a chose in action, and any number of subsequent

assignees take and hold the same subject to all of the equities, rights and defenses existing between the original parties to such assignment.

(f) The jury is instructed that a policy of life insurance is non-negotiable, and is classed and characterized as a chose in action and is different in its nature and purport to that of the negotiable instrument, and the law which applies to negotiable instruments, such as promissory notes, does not apply to a policy of insurance in that the subsequent assignees of the policy of insurance take it subject to all of the defenses, rights and equities existing between the original parties to such transfer.

(g) The jury is instructed that the statutes and decisions of this state recognize a well-marked distinction in the rights of assignees between negotiable instruments and those which are not negotiable. A policy of insurance is a chose in action and the assignees thereof are not protected by the equity of purchasers for valuable consideration without notice. Therefore, even if the jury should find that B. S. was a bona fide assignee of this policy of insurance mentioned in the complaint, he took the same subject to all the rights and equities that originally existed between A. and R.

(h) The jury is instructed that the defendant, S., a subsequent assignee of the policy of insurance herein cannot claim the protection of the equity rule in favor of purchasers for valuable consideration without notice, but that he took the said assignment of policy subject to all of the rights, defenses and equities that existed between the original parties, to wit, A. and R., and the jury are further instructed that the administratrix of the estate of A. stands in his stead and is entitled to all the rights and privileges that would have been accorded to A. by law.

(i) The defense of a purchaser for value, without notice, is an equitable defense, and is subject to that absolute rule of law that any assignee of a chose in action takes the same subject to whatever rights existed between the original parties to such chose in action; and so in this case if you conclude that there was any right or any reservation subsisting between A. and R. the rule of law protects that right and makes it superior to the claim of a purchaser for value without notice; and in that view of the case the doctrine of purchaser for value without notice would have no application in this suit.

(j) The jury is instructed that before a person can set up a plea of bona fide purchaser for value without notice, it must be shown that the party claiming such benefit parted with money or some valuable consideration, at the time of the transaction, and where a party has already parted with property or money, such consideration cannot enter into and establish the plea of bona fide purchaser for value, and on the contrary he should have held that where a party has already parted with property or money the same

should be a basis to a plea of bona fide purchaser for value, if there was thereafter an agreement to indulge the debt, or generally attended by actual forbearance for a reasonable time.

(k) The jury are instructed that if R. and S. bore no blood relation to A., then they would have no insurable interest in the life of A.; the policy of insurance taken out in the name of such stranger or transferred to such stranger without some specific valuable consideration would be void in law, as the same would be a mere wager policy.

The jury are instructed that if a person procures a policy on the life of another person who bears no blood relation to the person procuring such insurance, or if such person procures the assignment of the policy from a person who bears no blood relation to such assignee, then I charge you as a matter of law that such policy would be held to the extent of the money or other valuable consideration actually advanced for the procurement of such policy, or the assignment thereof.[20]

FRATERNAL AND BENEFIT SOCIETIES.

§ 1206. Misrepresentations in Application as to Use of Liquor. (a) The court instructs the jury that, unless you believe, from a preponderance of the evidence, that plaintiff's husband at the time the policy sued on was issued was in the habit of using intoxicating liquors to some extent, that then upon the question of the policy

20—Westbury v. Simmons, 57 S. C. 467, 35 S. E. 764 (770).

Comment of the court:

"We will first consider whether the provisions of section 133 of the Code are applicable to the case. That section is as follows: 'In the case of an assignment of a thing in action the action by the assignee shall be without prejudice to any set-off or other defense existing at the time of or before the notice of the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange transferred in good faith and upon good consideration before due.' This section, it will be observed, refers to an action 'by the assignee' and has no application to an action by the representatives of an assignor against a subassignee.

"We will next consider whether the action of A. was such as might reasonably have been expected to induce a person to purchase from his assignee, R., without making inquiry as to the consideration upon which the assignment was made by A. to R. The form of the assignment is as follows: 'For value received, I hereby assign and set over unto R. all of my right, title and interest in the within policy. Witness my hand and seal this —— day of ——. A. (L. S.)' The principle is well settled in this state that the assignee of a non-negotiable chose in action takes it subject to the equities existing between the original parties. Patterson v. Rabb., 38 S. C. 138, 17 S. E. 463, 19 L. R. A. 831; Gibson v. Hutchins, 43 S. C. 287, 21 S. E. 250; British-Am. Mortgage Co. v. Smith, 45 S. C. 83, 22 S. E. 747; Pittman v. Raysor, 49 S. C. 469, 27 S. E. 475.

"The form of assignment by A. to R. was such as is usually and ordinarily employed in transferring the title to non-negotiable instruments, and we see nothing upon the face thereof that could reasonably have been expected to mislead S., he being presumed to know that the assignee of a non-negotiable chose in action takes it subject to the setoffs and defenses existing at the time of the assignment."

having been obtained by false representation, you will find for the plaintiff, and the court instructs the jury that a habit means more than a rational or incidental use.[21]

(b) The court instructs the jury that a single or an occasional excess does not make a man an habitual drunkard; but, if you find that the habit and rule of a man's life is to indulge periodically and with frequency and with increasing frequency and violence in excessive intemperance, such a use of liquor may properly cause the finding of habitual drunkenness.[22]

§ 1207. Legal Definition of Suicide—Must Be Sane in Order to Commit. (a) The court instructs the jury that suicide, or self-destruction, as these terms are to be understood in the law, implies that the act was deliberately done by a person capable in law of forming a legal intention to do the act; and if you find, from the evidence in this case, that the said W. was insane at the time he took his life, and even though he intended that the result of his act should be death, yet if his reasoning faculties were so impaired that he was not able to understand the moral character, the general nature, consequences and effects of the act he was about to commit, or if he was impelled thereto by an insane impulse which he had not the power to resist, then his act was not suicide in the legal sense of these terms, and you should find the issue in favor of the plaintiff, so far as that issue is concerned.[23]

21—Grand Lodge A. O. U. W. v. Belcham, 145 Ill. 308 (312), 33 N. E. 886.

"The language embodied in the application must receive a reasonable construction, one within the contemplation of the parties at the time the contract of insurance was consummated. What was the purpose of requiring the assured to state in the application to what extent he used alcoholic stimulants, tobacco and opium? But one object can be perceived, and that was to guard against the risk of insuring the life of one who was in the habit of using the articles or either of them to such an extent as to imperil the health and life of the individual. If a man drank a glass of liquor or smoked a pipe of opium or a cigar once a month, it is plain that such a use could not endanger the life of the person, and that such a use was not within the contemplation of the parties when the contract of insurance was entered into by the parties. It may be that the language of the question and answer in regard to the use of alcoholic stimulants, if given a strict and technical construction, might be interpreted that the insured did not use alcoholic liquors at all, but in our opinion an insurance company propounding a question of that character should not be allowed to indulge in a strict and technical construction, but on the other hand the language should receive a fair and reasonable construction, a construction which would imply more than a rational use. There should be to some extent at least a habit or custom. This is the rule established in Van Valkenburg v. A. P. L. Ins. Co., 70 N. Y. 605, and we think it the correct one."

22—N. W. L. Ins. Co. v. Muskegon Bank, 122 U. S. 501 (510), 7 S. Ct. 1221.

23—Grand Lodge I. O. M. A. v. Wieting, 168 Ill. 408 (418), aff'g 68 Ill. App. 125, 61 Am. St. Rep. 123, 48 N. E. 59.

"The foregoing instruction, given on behalf of defendant, was approved in an action, upon a benefit certificate containing the following provision: 'Provided however that should the said W. commit suicide, then and in that case only the amount paid by the said W. into the beneficiary fund by virtue hereof shall be paid to the bene-

(b) **Suicide While Sane or Insane—Where Policy so Provided Is Void.** The court instructs the jury: if you believe, from the weight of the evidence, that ———— took his life, and that he at the time was so insane as to be incapable of forming an intention to take his life and did not comprehend and understand the physical nature and results of his acts, then the fact of his taking his own life under

ficiaries above named, which said amount shall be in full of all demand whatsoever arising out of or under this beneficiary certificate.' It has been uniformly held, so far as we are advised, that if a policy contains no provision on the subject, the death of assured from his own act resulting from insanity is as much assured against as death resulting from any other physical affliction. Suicide at common law ranked as a crime and was punished by forfeiture of goods and ignominious burial (4 Blackstone's Com. 189-190), and many authorities in view of this fact have construed clauses in policies exempting the assurer from liability if the assured should commit suicide as effective only when the circumstances of the self-killing and the mental condition of the assured were such it would have been deemed by the common law he had committed the crime of self murder. . . . In America, however, self-destruction is not a crime, and the meaning given to the word 'suicide' in criminal law seems to have been abandoned in construction of insurance policies, and the phrase 'committed suicide' has been declared synonymous with the other phrases employed to convey the idea of voluntary intentional self-destruction.

"The supreme court of the U. S. is committed to the doctrine that in order to relieve the insurer from liability because of the proviso of the character here involved, there must have been sufficient mental understanding to realize the moral turpitude of the act of self destruction. Life Insurance Co. v. Terry, 15 Wall. 580; Bigelow v. Berkshire Life Insurance Co., 93 U. S. 284, 19 Am. Rep. 628; Manhattan L. Ins. Co. v. Broughton, 109 U. S. 121, 3 S. Ct. 99. In Life Ins. Co. v. Terry (supra) after a full review of the previous decisions, the court remarked: 'We hold the rule on the question before us to be this: if the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy or desire to escape from the ills of life, intentionally takes his own life, the proviso attaches and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to do, or that he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable.' This view has met the approval of the court of last resort in the state of New York, Vanzandt v. Mut. B. L. Ins. Co., 55 N. Y. 169; 14 Am. Rep. 215; Newton v. Same, 76 N. Y. 426, 32 Am. Rep. 335; Pennsylvania, Commercial L. Ins. Co. v. Groome, 86 Pa. St. 92, 27 Am. Rep. 689; Am. L. Ins. Co. v. Isett, 74 Pa. St. 176, 15 Am. Rep. 545; Maryland Knickerbocker L. Ins. Co. v. Peters, 42 Md. 414; Bank of Oil City v. Guardian Mut. L. Ins. Co., 5 Big. Ins. Cas. 478; Tennessee, Phadenhauer v. Germania L. Ins. Co., 7 Heisk 567, 19 Am. Rep. 623; Georgia, Marritt v. Cotton States L. Ins. Co. 55 Ga. 103; L. Assocn. of Am. v. Wallar, 57 id. 533; Mich., John Hancock Mut. L. Ins. Co. v. Moore, 34 Mich. 41; Vermont, Hathaway v. Nat. L. Ins. Co., 48 Vt. 335; and Ohio, Schultz v. Ins. Co., 40 Ohio St. 217, 48 Am. Rep. 676. And upon principle as well as what seems to be the prevailing judicial sentiment in the U. S. we accept and adopt it. Mut. Life Ins. Co. v. Terry, 15 Wall. 580, 21 L. 236; Schultz v. Ins. Co., 40 Ohio St. 217; Brasted v. Farmer's L. & T. Co., 4 Hill 74; St. Louis Mut. Life Ins. Co. v. Graves, 6 Bush (Ky.) 268; Phadenhauer v. Germania L. Ins. Co., supra; 2 Biddle on Insurance, 831-832."

such circumstances would not defeat a recovery for the full amount of the policy.[24]

§ 1208. **Committing Suicide in Sane State of Mind—No Liability—Narcotics or Opiates.** (a) The court instructs the jury that you are the sole judges of the facts in this case, and although the jury may believe, from the evidence, that said W. at times acted strangely and in such a manner as to cause some people to believe him to be insane, yet if they believe, from all the evidence in the case, that said W. when he committed the act of hanging himself by his own hand, was not so insane but that he knew what he was doing, then he knew death would result from the act, and that he committed the act intentionally to put an end to his life, and that at the time his mental faculties were not so impaired but that he was able to understand the moral character and general nature, consequences and effect of the act he was about to commit and that he was not impelled thereto by such an insane impulse as he had not the power to resist, then the court instructs the jury, as a matter of law, that the defendant is not liable upon the beneficiary certificate sued on in this case except to the extent of the amount paid by the said W. into the beneficiary fund of the defendant, which, it is admitted by the parties, is $——

(b) If the jury believe, from the evidence, that said W. came to his death by hanging himself, and although the jury may further believe, from the evidence, that said W. was then insane, and that he acted under the influence and impulse of insanity, and that his act of self-destruction was the direct result of insanity, yet if the jury further believe, from the evidence, that the said W. was not then in a state of madness or delirium, and that such act of self-destruction was the result of the will and intention of the said W., he adopting the means to the end and contemplating the physical nature and effects of the act, then the court instructs the jury, as a matter of law, that the defendant is not liable on the beneficiary certificate sued on except to the extent of the amount

24—Supreme L. K. of P. v. Clarke, 88 Ill. App. 600 (605).

"The Supreme Court, in Grand Lodge I. O. M. A. v. Wieting, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123, in passing upon the question whether the assured commits suicide when insane the policy will necessarily be void, if it contains a proviso to that effect, said: "There is much conflict of opinion and authority as to the effect of the condition or proviso of the policy when insanity has so far overcome the consciousness of the assured as that he is unable to appreciate the moral wrong involved in the act of taking his own life, though he had mind enough to intend the act and was aware of its physical effect.' The clause in the policy in this case contained the provision that if his death should 'result from suicide either voluntary or involuntary whether . . . sane or insane at the time,' the amount to be paid the beneficiary would be the value of the certificate at his death to be computed in the manner set forth in the stipulation. Under this condition, the instruction was erroneous."

As will be observed, that under the provision of the policy in this case the giving of this instruction was error. It would however be a proper instruction in form "a" this section.

paid by the said W. into the beneficiary fund of the defendant by virtue of such beneficiary certificate.[25]

(c) Whenever the defendant has produced evidence which preponderates in favor of the view that said —— did take narcotics or opiates with the intention of producing death, and you find that same did produce death, then it has met the requirement of the law, as applied to the cases of persons who unintentionally commit suicide, and in such case your verdict will be for the defendant.[26]

§ 1209. **Taking Own Life Not Proof of Insanity.** The court instructs the jury that, if you believe, from the evidence, that said W. took his own life, that fact alone does not raise a presumption, and is not of itself evidence, that he was insane at the time of committing said act; but the jury may weigh such act and the circumstances attending it, so far as disclosed by the evidence, in connection with all the evidence in the case bearing on that question, in determining his mental condition at the time of the act of self-destruction.[27]

§ 1210. **Presumption of Death from Seven Years' Absence.** (a) The court instructs the jury, as a matter of law, that if you find from the preponderance of the evidence in this case that R., the insured, left his residence and home and has been continuously absent therefrom for a period of over seven years without any intelligence being received of his whereabouts by the members of his family, relations, neighbors and acquaintances within said period or at any time thereafter, then such continued absence, together with such lack of intelligence, raises the presumption of

25—Grand L. I. O. M. A. v. Wieting, 168 Ill. 408 (416), aff'g 68 Ill. App. 125, 48 N. E. 59, 61 Am. St. Rep. 123.

The foregoing instruction, given on behalf of defendant, was approved in an action upon a benefit certificate containing the following proviso: "Provided however that should the said W. commit suicide, then and in that case only the amount paid by the said W. into the beneficiary fund by virtue hereof shall be paid to the beneficiaries above named, which said amount shall be in full of all demand whatsoever arising out of or under this beneficiary certificate."

26—"This statement is correct law." Endowment Rank O. of K. P. v. Steele, 107 Tenn. 1, 63 S. W. 1126 (1128).

27—Grand L. of I. O. M. A. v. Wieting, 168 Ill. 408 (415), aff'g 68 Ill. App. 125, 48 N. E. 59, 61 Am. St. Rep. 123.

"There is no presumption of law that self-destruction arises from insanity. The law presumes normal conditions to exist,—hence that all men are sane. Insanity being an abnormal condition must be proven as a question of fact . . . The law does not declare that one who takes his own life is to be deemed, as a matter of law, to be insane, nor that the act of suicide shall not be considered in determining whether such person was of a sound mind. Whether insane or not is a question of fact in determining which, it is competent to consider the acts and conduct of the party in question, and no reason is perceived why the act of self-destruction, the manner and mode thereof, and all attendant circumstances, should be excluded from consideration. This view finds support in Karow v. N. Y. Continental L. Ins. Co., 57 Wis. 56, 15 N. W. 27, 46 Am. Rep. 17; and Terry v. Ins. Co., 3 Dill. 408. The instruction properly left the question of insanity to be determined from the evidence as one of fact."

death of the said R., and the jury on such proof have a right to presume his death.[28]

(b) The jury are instructed that if you believe from the evidence and all the facts and circumstances shown on this trial that the insured, R., was not dead at the time of the commencement of this suit, then your verdict must be for the defendant.[29]

§ 1211. **"Good Health" Defined.** (a) Upon the law of the case you are instructed that, if, at the time the benefit certificate in question was delivered to L., he was in good health, the plaintiff is entitled to recover. In this connection you are instructed that by being in good health is meant that at the time of the delivery of the benefit certificate, L. did not have any disease of a serious nature.

(b) But if you believe from the evidence that L. at the time said beneficiary certificate was delivered to him was not sick, then you will find for plaintiff.

(c) Or, if you believe from the evidence that at the time the beneficiary certificate was actually delivered the said L. was unwell, but that the illness was not of a serious nature and did not affect the risk or the probable duration of his life, then you are instructed that within the meaning of the conditions of the certificate, said L. was in good health.[30]

(d) The court instructs the jury that the words "good health," when applied to a human being, mean that the person said to be in good health is in a reasonably good state of health, and that he is free from any disease or illness that tends seriously or permanently to weaken or impair the constitution.[31]

§ 1212. **Delay in Payment of the Premium—Waiver of Forfeiture —Burden of Proof on Defendant to Show Forfeiture—Reinstatement.** (a) The court also instructs the jury that the certificate of membership which was filed with the petition in this cause, and

28—The Policemen's Ben. Ass'n v. Ryce, 213 Ill. 9 (14) aff'g 115 Ill. App. 95, 72 N. E. 769, 104 Am. St. Rep. 190.

29—Policemen's Ben. Ass'n v. Ryce, supra.

"It is claimed that the above instruction given for appellee in effect required the jury to find in her favor, since it does not permit the jury to consider the circumstances attending R.'s disappearance and bearing upon the question as to whether he was, in fact dead. We think the contention is not sound, and is not supported by the cases cited and especially relied on, viz.: Winter v. Supreme Lodge, etc., 96 Mo. App. 1-19, 69 S. W. 662; Mutual B. L. I. Co. v. Martin, 108 Ky. 11-18, 55 S. W. 694; and Dunn v. Travis, 56 App. Div. 317, 67 N. Y Sup. 745."

30—Woodmen v. Locklin, 28 Tex. Civ. App. 486, 67 S. W. 331 (337).

"The issue submitted by the court is simple, and the jury must have understood it in the proper sense, and we cannot see that they were misled by the court's charge."

31—Court of Honor v. Dinger, 221 Ill. 176 (181), 77 N. E. 557.

"This instruction gives a reasonable definition to the term 'good health' and we think a correct one. At all events, it is the defendant's own definition, and we see no good reason why it should not be bound by it. Certainly, under that definition the special findings of the jury were in no sense inconsistent with the general verdict."

has been read in evidence by the plaintiff, is proof that McM. was in good standing with the order at the time when said certificate was issued, and that the law presumes that such good standing continued thereafter; and the burden of proof is upon the defendant to show to the satisfaction of the jury that at the time of his death the said McM. had lost his good standing in the order. If the jury are satisfied from the evidence that it had not been the practice of the finance keeper of A. Tent to exact prompt payments of assessments when due; that he and said Tent had allowed assessments to remain unpaid several days or weeks after they became due, and then accepted payment of the same without requiring McM. to submit a physician's certificate; and if the jury also from the evidence, believe and find that the deputy supreme commander of the defendant order for the state of Nebraska at the time knew of this practice of said finance keeper of said Tent, and made no objection thereto,—then these are facts from which the jury may find that the defendant waived literal compliance with the conditions as to punctual payment of assessments and furnishing such certificate.

(b) The court instructs the jury that the mere fact that the finance keeper of A. Tent had received any prior assessment from the deceased after the time when under defendant's laws it was due or after the deceased stood suspended, without a physician's certificate of good health, if you find the finance keeper did so receive any assessment, did not bind the defendant to a course of conduct or practice or custom so as to make it compulsory on the finance keeper of A. Tent or defendant to receive assessment No. 92 without a physician's certificate of good health at the time it was mailed to said finance keeper.[32]

(c) The jury are instructed that the relation between the district courts and the supreme court of defendant is that of agency, and whatever the district court did, through its proper officer, in the matter of the suspension and re-instatement of D., is binding on the defendant.

(d) You are instructed that Morning Glory Court No. 705 of the Court of Honor was an agent for the supreme court in all its dealings with the deceased, D.; and if the jury believe, from the evidence, that said local court, acting by its officer, the recorder, D., accepted from the said A. assessments and general dues after his suspension on December 1, 1902, and re-instated him, upon the bonds of said local lodge, and if the jury further believe, from the evidence, that the said D. was a member in good standing upon the books of said local court at the time of his death, and that he had paid all assessments and general dues then owing by him to said order, that is evidence from which the jury might infer that

32—McMahon v. Supreme T. K. Maccabees, 151 Mo. 522, 52 S. W. 384 (386).

the defendant waived the right to declare contract of insurance forfeited.[33]

§ 1213. **Verdict of Coroner's Inquest Is Evidence of Cause of Death.** The court instructs the jury that the verdict of the coroner's jury offered in evidence in this case is competent to be considered by the jury in connection with the other evidence in the case in determining the cause of the death of ——, the insured.[34]

§ 1214. **Incapacity for Manual Labor—Manual Labor Defined.** The term "manual labor" in its ordinary and usual meaning and acceptation means labor performed by and with the hands or hand, and it implies the ability for such sustained exercise and use of the hands or hand at labor as will enable a person thereby to earn or assist in earning a livelihood. Being able to temporarily use the hands or hand at and in some kind of labor, but without the ability to sustain such ordinary exercise and use of the hands at some useful labor whereby money may be earned to substantially assist in earning a livelihood at some kind of manual labor as it must be understood was contemplated by the parties to the indemnity contract sued upon and relied upon in this action.[35]

§ 1215. **Total Disability—Right to Sue—Notifying Board Before Suit.** The constitution of the defendant society provides that a member making a claim for indemnity on account of total disability shall present his proof of such disability, and that the question of his right to receive payment shall be referred to a board of the officers of the grand lodge, and further provides, if such claims are disallowed by the board, the claimant may appeal to the grand lodge in session. This provision does not deprive the plaintiff of his right to sue the claim in a court of law. But it was his duty before beginning such suit to

33—Court of Honor v. Dinger, 221 Ill. 176 (181, 182), 77 N. E. 557.

"It is insisted that both of these instructions ignored the provision of section 147 of appellant's constitution and by-laws, which provides that a district recorder is an agent of the district court and not an agent of the Court of Honor. Admitting that the constitution and by-laws contain such a provision, yet under the facts and circumstances of this case as they appear in evidence the court was justified in assuming the contrary and in so instructing the jury. Upon the suspension of a member, if he paid his dues within sixty days after the delinquency he was entitled to be re-instated in the society, provided he was at that time in good health. All A. had to do, as far as his reinstatement was concerned was to pay the amount of his delinquency to the recorder of the local society and if he was in good health he had the right to be, and the record shows that he was in that provision, regularly re-instated to all his rights as a member of the order. We do not see how it can be seriously contended that the recorder of the district court in this respect did not act as the agent of the supreme court. We have held in several cases that in view of such facts the officers of the subordinate lodge act as the agents of the supreme lodge. Grand Lodge A. O. U. W. v. Lachmann, 199 Ill. 140, 64 N. E. 1022."

34—Supreme Court of H. v. Barket. 96 Ill. App. 490 (498).

35—Grand L. of B. of L. F. v. Orrell, 206 Ill. 208 (211), 69 N. E. 68.

first lay his claim before the proper officers or board of the defendant, and give it opportunity to pay without further litigation; and, if he failed to show that he had made such proofs before commencing this suit, he cannot recover.[36]

§ 1216. If Plaintiff Is Able to Do Any Work, Not Liable Under "Total Disability" Clause. The jury are instructed that if they find, from the evidence, that the plaintiff is able to do, perform or direct any kind of labor or business, then their verdict will be for the defendant.[37]

36—Lillie v. Brotherhood of Ry. Trainmen, 114 Iowa 252, 86 N. W. 279 (280).

"Accepting plaintiff's disability, as we must, in view of the record, as being covered by the policy, this instruction announces a correct rule of law. The facts are that plaintiff's claim was presented to defendant, and on its disallowance he says he took an appeal to the grand lodge. He is not contradicted on this point. Such being the case, plaintiff is certainly not deprived of his right to sue at law. There is no provision of the constitution which attempts to make the decision of the lodge tribunal a finality, as in Anacosta T. of Redmen v. Murbach, 13 Md. 91, 71 Am. Dec. 625, and kindred cases, except article 44; and, as we have said, no question is made under that provision. Apparently plaintiff had exhausted his remedies within the order. Under the authorities cited by appellant, he was entitled to proceed in the courts. Nibl. Mut. Ben. Soc. para. 311 et seq. See also Bauer v. Lodge, 102 Ind. 262, 1 N. E. 571; Dolan v. Court G. Samaritan No. 5910 A. O. O. F., 128 Mass. 437. There are cases like McNamara v. Harrison, 81 Iowa 203, 52 N. W. 125, 9 L. R. A. 841, in which it was held valid to make the decision of a third person a condition precedent to the right to sue. But there was no attempt here to do this, so far as is claimed."

37—Supreme T. of K. of Maccabees v. King, 79 Ill. App. 145 (149).

This was an action upon a benefit certificate which provided for payment in case of "total disability."

CHAPTER LVI.

INTOXICATING LIQUORS—CIVIL.*

See Erroneous Instructions, same chapter head, Vol. III.

§ 1217. Suit by Wife for Death of Husband—What Must Be Proved—Statutory Provisions. (a) The jury are instructed, that by the law of this state, every person who sells or gives intoxicating liquors to another, and thereby, in whole or in part, causes the intoxication of such person, is liable to the wife of the person so becoming intoxicated, for any injury which she may sustain in her means of support, resulting from the death of her husband, if his death ensues as a consequence of such intoxication.[1]

(b) The jury are instructed, that if they believe, from the evidence, that the plaintiff was the wife, and is now the widow of the said F. M., and that the said defendants, or any or either of them, or the servants, employes or any person acting for said defendants, or any or either of them, did on or about ——— sell or give to the said F. M. beer, or any intoxicating liquor, and thereby, in whole or in part, cause the intoxication of the said M., and that the said M., while under the influence of such intoxication, and in consequence thereof, lost his life in manner and form as charged in the declaration, and that the plaintiff was thereby damaged in her means of support, then the jury should find the said defendants, or such of them as are proved to have contributed to such intoxication, in whole or in part, guilty, and assess the plaintiff's damages.[2]

*Note.—The statutes of the different states, giving a right of action for injuries sustained in consequence of the intoxication of any person, vary somewhat in their details, although they are similar in their general features. The following instructions, adapted to this class of cases, with slight changes, will generally be found applicable to the laws of most of the different states.

1—O'Halloran v. Kingston, 16 Ill. App. 659.

2—Fountain v. Draper, 49 Ind. 441; Emory v. Addis, 71 Ill. 273;

(c) The court instructs the jury, that to entitle the plaintiff to recover against any one or more of the defendants, the jury must believe, from the evidence, that such defendants sold or gave intoxicating liquors to the deceased, and thereby caused or contributed to cause, his intoxication, in whole or in part; and so far as the injury complained of results from the death of the deceased, it must appear that the death was caused by such intoxication.[3]

§ 1218. **Injured in Means of Support by Sale of—Enforcement of Law on the Statute Books.** (a) The court instructs the jury that it is not for them to inquire into or consider the propriety of the law in force relating to the sale of intoxicating liquors under which this action is brought. The law as it now stands upon the statute books of this state should be enforced, and if the jury believe from a preponderance of the evidence in this case that the defendants or any of them contributed to the intoxication of said B., if such intoxication has been proven by a preponderance of the evidence in this case, and that said B. was a person in the habit of becoming intoxicated, and that in consequence of such intoxication the plaintiffs have been injured in their means of support by reason of such intoxication, then the jury should find for the plaintiffs and against the defendants or such of them, as the jury shall find from the evidence have contributed to such intoxication in whole or in part.[4]

(b) You are instructed that, by the law of this state, every person who sells or gives intoxicating liquors to another, and thereby, in whole or in part, causes the intoxication of such person, is liable to the wife of the person so becoming intoxicated for any injury she may sustain to her means of support resulting as a consequence of such intoxication.[5]

§ 1219. **Degree of Intoxication.** The court further instructs you that it is not sufficient in order to hold the defendant liable in this case that the deceased merely felt the liquor which he had been drinking, or that he was slightly under the influence of liquor, or that he was feeling good merely, but that it is absolutely essential, before there can be any recovery, for you to believe, from all the evidence, that the deceased was intoxicated. And if you further believe from

Woolheather v. Risley, 38 Ia. 486; Worley v. Spurgeon, 38 Ia. 465; Kehrig v. Peters, 41 Mich. 475, 2 N. W. 801; Flynn v. Fogarty, 106 Ill. 263.

3—Kratch et al. v. Heilman, 53 Ind. 517; Flynn v. Fogarty, 106 Ill. 263.

4—Johnson v. McCann, 61 Ill. App. 110 (113).

5—Murphy v. Gould, 40 Neb. 128, 59 N. W. 383.

"The doctrine enunciated in the foregoing request to charge has been sanctioned by this court in every decision upon the subject from Roose v. Perkins, 9 Neb. 304, 2 N. W. 715, to the present time, and is the settled law of this state. See Elshire v. Schuyler, 15 Neb. 561, 20 N. W. 29; Kerkow v. Nauer, 15 Neb. 150, 18 N. W. 27; McClay v. Worrall, 18 Neb. 44, 24 N. W. 429; Warrick v. Rounds, 17 Neb. 411, 22 N. W. 785; Wardell v. McConnell, 23 Neb. 152, 36 N. W. 278; Jones v. Bates, 26 Neb. 693, 42 N. W. 751, 4 L. R. A. 495."

all the evidence that the deceased was not intoxicated, and that when he left defendant's place of business on the evening in question he was perfectly able to take care of himself, and did not thereafter become intoxicated from liquors obtained from the defendant, then you must find the defendant not guilty.[6]

§ 1220. Sufficient if the Liquor Sold Contributed, etc. (a) The jury are further instructed that though they may believe, from the evidence, that the deceased had liquor in his house, or about his person, or had bought or taken it at places other than at the saloon of the defendants, still, this fact would constitute no defense to this action; provided the jury believe, from the evidence, that the deceased obtained intoxicating liquors at the saloons of the defendant, which contributed to his intoxication, and that his death resulted as a consequence of such intoxication.[7]

(b) In order to make a dram-shop keeper liable for injuries occasioned by intoxication, which results from the drinking of intoxicating liquors sold by him, it is not necessary that such intoxication should be wholly produced by liquor sold by him; it is only necessary to show that the liquor sold by him contributed or assisted in producing such intoxication.[8]

(c) If you believe from the evidence that the defendant, A., on September 11th, 1902, by himself or his servant, in a certain building occupied by him, sold or gave to the deceased intoxicating liquors, which in the whole or in part caused the intoxication, if any, of the said deceased, then your verdict should be for the plaintiffs.[9]

§ 1221. Proximate Cause—New or Intervening Cause. (a) As a matter of law, damages, to be recoverable, must be the natural and reasonable result of the defendant's act; and if of such a character as in the ordinary course of things would flow from the act, they may be recovered, otherwise they are too remote. A party cannot be held responsible for injuries which could not reasonably have been foreseen or expected, as the result of his misconduct.[10]

(b) The damages to be recovered in an action must always be the natural and proximate consequence of the wrongful act complained of. If a new force or power has intervened, of itself sufficent to stand as the cause of the mischief or injury, the first must be considered as too remote.[11]

6—Shorb v. Webber, 89 Ill. App. 474 (478), aff'd 188 Ill. 126, 58 N. E. 949.

7—Roth v. Eppy, 80 Ill. 283; Boyd v. Watt, 27 Ohio St. 259; Woolheather v. Risley, 38 Ia. 486; Jessen v. Wilhite, — Neb. —, 104 N. W. 1064.

8—O'Halloran v. Kingston, 16 Ill. App. 659.

9—Triggs v. McIntyre, 215 Ill. 369, aff'g 115 Ill. App. 257, 74 N. E. 400; Kelley v. Malhort, 115 Ill. App. 23.

10—Phillips v. Dickerson, 85 Ill. 11; Shugart v. Egan, 83 Ill. 56; Schroeder v. Crawford, 94 Ill. 357; Hart v. Duddleson, 20 Ill. App. 619; Schulte v. Menke, 111 Ill. App. 212, aff'd 210 Ill. 357, 71 N. E. 325.

11—Schmidt v. Mitchell, 84 Ill. 195; Currier v. McKee, 99 Me. 364, 59 Atl. 442.

(c) If you believe from the evidence that the deceased came to his death by suffocation and that the cause of such suffocation is not shown by the evidence, then you will find the defendants not guilty.

(d) Even though you may believe from the evidence that the deceased procured intoxicating liquor from the defendant, A., and that he became intoxicated therefrom, still if you further believe from the facts and circumstances in evidence in this that he came to his death by reason of the willful or criminal act of some person or persons, unknown, which act was not provoked by said deceased, and that such willful or criminal act, and not his intoxication, was the effective cause of his death, then you should find the defendants not guilty.[12]

§ 1222. Exact Date of Sale Not Required—Preponderance of Evidence Sufficient. (a) The jury are instructed that in order to entitle the plaintiff to recover it is not necessary that the plaintiff should prove that the sales were made on the particular days set out in the declaration; that in order to recover under the counts covering a period of time the plaintiff must show a sale within the period named; but that under the counts where particular days are set out, the plaintiff may recover for injuries which she suffered by reason of a sale made on any day not used as a basis for recovery under any other count.[13]

(b) The jury are further instructed, that in civil actions of this kind, it is not necessary that the fact of the sale of intoxicating liquors, or any other fact necessary to a recovery, should be proved beyond a reasonable doubt; it is only necessary that the facts should be proved by a preponderance of the evidence.[14]

(c) Unless from a consideration of all the evidence it is shown by a preponderance of all the evidence that the effective cause of the death of the deceased was by reason of drinking intoxicating liquor, your verdict should be not guilty.[15]

§ 1223. Permission to Defendant by Wife to Sell Liquors to Husband Occasionally Not Bar to Action—Exemplary Damages. (a) Although you may believe from the evidence that the plaintiff wrote the defendant G. that she did not object to his selling her husband intoxicating liquors occasionally, such fact would not bar her action, but if such fact is proven by a preponderance of the evidence, it may be considered by the jury, together with the other evidence in the case, in estimating the damages of the plaintiff, if the jury believe, from the evidence, the plaintiff is entitled to recover damages.

(b) The court instructs the jury that if they find, from the evidence, the plaintiff has sustained actual damages, then they may give

12—Triggs v. McIntyre, 215 Ill. 369, aff'g 115 Ill. App. 257, 74 N. E. 400.

13—Sackett v. Ruder, 152 Mass. 397, 25 N. E. 736 (740), 9 L. R. A. 391.

14—Mayers v. Smith, 121 Ill. 442, 13 N. E. 216.

15—Triggs v. McIntyre, 215 Ill. 369, aff'g 115 Ill. App. 257, 74 N. E. 400.

her exemplary or punitive damages, if they find, from the evidence, the conduct of the defendants whom they find guilty has been wanton and in willful disregard of the plaintiff's rights.[16]

§ 1224. **Liability of Owner of Premises Where Illegal Sales of Liquor are Made.** The jury are instructed, that under our statute, the owner of premises upon which intoxicating liquors are kept for sale, contrary to law, is not guilty of an offense if he, in good faith, leased them for a lawful purpose, and did not afterwards affirmatively assent to such unlawful use; the mere failure to prevent, or to attempt to prevent, the illegal use or sale of the liquors, does not subject him to the penalties of the statute.[17]

§ 1225. **Suit Against the Saloon-Keeper and Owner of the Building Jointly.** The court instructs the jury, that the law under which this suit is brought, provides that every wife, who shall be injured in person or property, or means of support, in consequence of the intoxication, habitual or otherwise, of her husband, may have a right of action, in her own name, against any person or persons who shall, by selling or giving intoxicating liquor to her husband, have caused such intoxication, in whole or in part; and the law further provides, that any person owning any building or premises where such liquors are sold therein, and knowingly permitting such sale, shall be liable jointly with the person or persons selling or giving such intoxicating liquors, for all damages which may be sustained in the manner above stated.[18]

§ 1226. **Setting Aside and Annulling License.** If you find that said sales of liquor were made in the city of Omaha, and at the time the plaintiffs had paid into the city treasury the sum of $1,000 and had their bond therefor on file and approved with the clerk of said city, and a license thereupon issued to them by the authorities of said city for the year ——, then your verdict should be for the plaintiffs, although such license may have been dated April 11, ——, and two days before the commencement of the municipal year of ——.[19]

16—Earp v. Lilly, 217 Ill. 582, 120 Ill. App. 123, 75 N. E. 552.

17—State v. Ballingall, 42 Ia. 87.

18—Loan v. Hiney, 53 Ia. 89, 4 N. W. 865; Triggs v. McIntyre, 215 Ill. 369, aff'g 115 Ill. App. 257, 74 N. E. 400.

19—Gillen v. Riley, 27 Neb. 158, 42 N. W. 1054 (1057).

"Were this a direct proceeding on the part of the proper authority against the plaintiffs for the purpose of setting aside and annulling their license, I should be of the opinion that this instruction was erroneous, but, upon a collateral issue by a party who has purchased of the licensees, who have sold in good faith, and especially as there is no evidence tending to prove that the plaintiffs were without a license issued within the municipal year in which the liquors were sold, I am of the opinion that there is no reversible error in the charge."

CHAPTER LVII.

LANDLORD AND TENANT.

See Erroneous Instructions, same chapter head, Vol. III.

§ 1227. Relation of Landlord and Tenant Must Exist—Contract of Renting. (a) Although the jury may believe, from the evidence, that the plaintiff was the owner of the property in question during the time alleged and that the defendant occupied the same during, etc., still this would not authorize the plaintiff to recover unless the jury believe, from the evidence, that the defendant acknowledged the rights of the plaintiff in the property and he held the same under the plaintiff.[1]

(b) The court instructs the jury that the defendant had the right and power to rent the said storehouse to plaintiffs, and if the jury believe from the evidence that plaintiffs and defendants agreed on

1—Lockwood v. Thunder Bay, etc., 42 Mich. 536, 4 N. W. 292; Moses v. Arnold, 43 Iowa 187; Noyes v. Loving, 55 Me. 408; Cent. Mills Co. v. Hart, 124 Mass. 123; Moore v. Harvey, 50 Vt. 297; Gallagher v. Hirnilberger, 57 Ind. 63.

the price to be paid therefor, and the time same was to be occupied by plaintiffs, and that plaintiffs were then in possession of said storeroom, they will find for defendants. Unless they so believe, they will find for plaintiffs.[2]

§ 1228. Tenant Holding Over—Contract Implied. (a) The court instructs the jury, that when a tenant holds over after the expiration of his term, with the assent of the landlord, expressed or implied, if there is no special agreement to the contrary, it will be upon an implied agreement or liability to pay rent thereafter on the same terms as to amount and times of payment as were provided in the original lease.[3]

(b) The court instructs the jury that if you believe from the evidence that the defendant is holding possession of the premises in question without right, and after the determination of a lease of the said premises, then you must find the issues for the plaintiff.[4]

(c) The jury are instructed that if they believe from the testimony that the defendants, after the close of the three-years' lease, induced the plaintiff to believe that the defendants desired to keep or would keep the premises in question for another year, then they should find for plaintiff in the amount sued for.[5]

§ 1229. Holding Over—Certain Demands by Tenant—Acquiescence of Agent. If you believe from a preponderance of the evidence that

2—Boltx v. Miller, 23 Ky. 991, 64 S. W. 630 (631).

"This instruction was substantially correct, and, in substance, should have been given to the jury."

3—Taylor's Land. and Ten. (9th Ed.) § 525; Clapp v. Noble, 84 Ill. 62; Weston v. Weston, 102 Mass. 514; Schuyler v. Smith, 51 N. Y. 309; Bacon v. Brown, 9 Conn. 334; Finney v. St. Louis et al., 39 Mo. 177; City of Plattsmouth v. New Hampshire Sav. Bank, 71 C. C. A. 507, 139 Fed. 631.

4—Kessel v. Mayer, 118 Ill. App. 267 (269).

"Appellant contends that the phrase 'without right' contained in this instruction is unintelligible even to the legal mind, and it is quite problematic in what light the jury viewed it, or what effect it had in the rendition of the verdict. A sufficient answer to this objection is found in par. 4, sec. 2, ch. 57, R. S., 1903, Hurd, which reads: 'The person entitled to the possession of the lands or tenements may be restored thereto in the manner hereinafter provided when any lessee of the lands or tenements or any person holding under him, holds possession without right, after the determination of the lease or tenancy by its own limitation, condition or terms, or by notice to quit or otherwise.'

"Further, the court at the request of appellant gave an instruction to the jury setting forth the particulars of the verbal lease under which appellant claimed possession of the premises, and thereby cleared away the doubt, if any doubt existed, as to the meaning of the phrase 'without right.' Stringham v. Parker, 159 Ill. 310, 42 N. E. 748; Calumet Dock Co. v. Morawetz, 195 Ill. 406, 63 N. E. 165."

5—Abeel v. McDonnell — Tex. Civ. App. —, 87 S. W. 1066 (1067).

"This charge does not militate against the view that, if the tenants held over after the term had expired, the law would imply a liability upon their part for the full term, but it is to the effect that, if the defendants induced the plaintiff to believe that they would keep the premises, then they would be liable for another year; which instruction, as far as it went, was correct. If such facts existed, the defendants would be liable."

at the time of the expiration of the written lease the tenant had notified plaintiff's agent that, without certain improvements were made, the defendants would only hold the house in question, and whether the improvements would be made was undecided on Jan. 1, 190—, and when defendants paid the monthly rental for January, 190—, they notified plaintiff's agent that they would remain only as tenants from month to month, and the agent accepted the month's rent with such notice, and acquiesced in said statement of the tenants, then if you so find, your verdict will be for the defendants.[6]

§ 1230. Holding Over—Increased Rental—New Contract. That when a tenant, under a lease from year to year, is notified by his landlord, before the expiration of his term, that if he occupies the premises another year he will have to pay a certain increased rent, and the tenant holds over without any further contract or understanding between the parties, such act of holding over will be construed as an implied agreement that he will hold the premises upon the new terms imposed.[7]

§ 1231. Wrongful Holding Over—Good Faith—Double Rent. That the question whether the defendant wrongfully held over the possession of the premises after the expiration of his lease, is a question of fact to be determined by the jury, from all the evidence in the case; and though the jury may believe, from the evidence, that the defendant did hold over wrongfully, still if they further believe, from the evidence, that the defendant had reasonable grounds for believing, and did believe, he had a right to hold over, then he would not be liable to the penalty of paying double rent for the premises.[8]

§ 1232. Landlord Not Bound to Repair—Altering Building—Waiver. (a) The jury are instructed, that under the lease introduced in evidence the landlord was under no obligation to make repairs on the premises, or to pay for any made by defendant; and unless the jury believe, from the evidence, that some subsequent agreement or arrangement has been made by the parties, by which the plaintiff has agreed to make such repairs, or to pay for those made by defendant, then, as to the question of repairs, the jury should find for the plaintiff.

(b) That without some express agreement to that effect, a landlord is under no obligation to make repairs on the premises during the time for which they are leased.[9]

6—Abeel v. McDonnell, — Tex. Civ. App. —, 87 S. W. 1066-8.

"We are inclined to the opinion that this charge embodied a proper issue to be submitted under the facts of the case. Such conduct of the agent, if true, would be an implied assent to the terms proposed by the tenants."

7—Despard v. Walbridge, 15 N. Y. 374; Higgins v. Halligan, 46 Ill. 173; Hunt v. Bailey, 39 Mo. 257.

8—Stewart v. Hamilton, 66 Ill. 255. Sub-tenant holding over, same rule applies. Fletcher v. Fletcher, 123 Ga. 470, 51 S. E. 418.

9—Taylor's Land. and Ten. (9th Ed.) § 327; Phelan v. Fitzpatrick, 188 Mass. 237, 74 N. E. 326; Rhoades v. Seidel, 139 Mich. 608, 102 N. W.

(c) If you believe, from the evidence, that the plaintiff verbally authorized the defendants to make the change, if any, which you may believe, from the evidence, was made in the building, this was a waiver by the plaintiff of the provision of the lease that no alteration should be made without the written consent of plaintiff as that provision was inserted in the lease for the benefit of plaintiff, and he had a right to waive it.[10]

§ 1233. Title to Crops—To Be Divided After Harvest—Right of Possession. (a) The title to the crop raised on rented land is not in the landlord, so as to empower him to sue for and recover upon it in trespass or its value in trover. He has a special lien upon it given by statute, which may be enforced by distress for rent.[11]

(b) The law is, in the case of a leasing of land for a share of the crops raised, to be divided after they are raised and gathered, that the title to the whole of the crop will be and remain in the tenant, until the crop has been divided and possession given to the landlord of his share.[12]

(c) In farming on shares, the tenant, as against the landlord, is entitled to the possession of the whole crop while it is growing, and may recover damages from the landlord if the cattle of the latter wrongfully break into the field and injure the crop.[13]

§ 1234. Diminished Enjoyment—Tenant Remaining—Bound to Pay Rent. The court instructs the jury that, if you believe from the evidence that any wrongful act of the plaintiff or omission to perform anything, required of her by her lease, was such as tended merely to diminish the beneficial enjoyment of the premises leased by the defendant, he was still bound for the rent if he continued to occupy the same, and that, if the defendant did not abandon the leased premises, his obligation to pay the rent therefor remained, but he might show, as a matter of defense in what manner such beneficial enjoyment of

1025; Burke v. Hulett, 216 Ill. 545, 75 N. E. 240.

10—Moses v. Loomis, 156 Ill. 392 (395), 40 N. E. 952.

"The maxim that an instrument under seal cannot be varied or abrogated by words not under seal is not applied in this state without various modifications (White v. Walker, 31 Ill. 422). Thus it is held that the release of a debt secured by a mortgage need not be under seal (Ryan v. Dunlap, 17 Ill. 40, 63 Am. Dec. 334), and usually where parties are bound to one another by writing under seal, the obligors will be discharged by parol proof of facts, if sufficient in themselves to constitute a discharge. The plaintiff having, by his words and conduct, caused the lessees to believe that he would not enforce the forfeiture provided for in the lease, and they with that belief having made the alterations in question, he ought equitably to be estopped from availing himself of the forfeiture."

11—Morrill v. Barnes, 57 Ga. 404.

12—Sargent v. Courrier, 66 Ill. 245; Townsend v. Isenberger, 45 Ia. 670.

13—Frout v. Hardin, 56 Ind. 165. It seems, the tenant, farming land on shares, cannot sue the landlord in trespass to recover for injury done to the growing crop by live stock belonging to the landlord, for the parties are co-tenants of the property. Wells v. Hollenbeck, 37 Mich. 504.

the premises was diminished by such act or omission to act of the plaintiff.[14]

§ 1235. **Premises Rendered Untenantable by Fire or Ice Gorge—Liability for Rent.** (a) The court instructs the jury as matter of law that where a lease is made of a portion of a building and such portion is damaged by fire, and the premises rented are rendered untenantable, but the premises are not totally destroyed but are capable of repair, these facts will not relieve the tenant from his liability to pay rent, unless the lease so provides. And if you believe, from the evidence, in this case, that the premises leased by the plaintiff to the defendant in this case were rendered untenantable by fire, but were not totally destroyed and were capable of repair, then that fact did not relieve the tenant from its liability to pay rent, as provided by the lease.[15]

(b) The jury are instructed that you should find for the plaintiff any unpaid amount of the sum of ———— dollars, stipulated in the lease as a monthly rent, and may allow interest on any such monthly installment from the time said monthly rent was due, unless they shall believe from all the evidence that the value to the defendant of the premises for its purpose was diminished without any fault or negligence of the defendant by reason of destruction of any building or structure on the premises by the ice or ice gorge set out in the defendant's special plea, in which event the jury should allow the defendant such abatement of the stipulated rent as they may believe from all the evidence to be a reasonable reduction of the rent on account of such destruction; but if the jury shall believe from the evidence that the injuries to the leased premises caused by said ice gorge spoken of herein were caused by the fault or negligence of the defendant, or that the premises were not rendered less valuable to the defendant thereby, they should make no reduction in the said rent on that account.

(c) If the jury believe from all the evidence that any of the buildings or structures upon the leased premises were destroyed without fault or negligence of the defendant by the ice or ice gorge in defendant's plea set out, and were not, before the bringing of this suit, replaced in whole or in part, and that in consequence thereof the value of the premises to the defendant for its purposes was diminished, they are instructed that the defendant should be allowed a reasonable abatement therefor, and the plaintiff is only entitled to

14—Rubens v. Hill, 213 Ill. 523 (541), 72 N. E. 1127.

15—Humiston, K. & Co. v. Wheeler, 175 Ill. 514 (518), aff'g 70 Ill. App. 349, 51 N. E. 893.

"It is alleged against this instruction that it was too broad, but we find no fault in it. There is no implied warranty of the landlord that the premises shall remain tenantable to the end of the term, and if they are injured and rendered untenantable, but not destroyed, the tenant is not relieved from his covenant, but may repair the damage and restore them to their former condition and enjoy them to the end of the term (3 Kent's Com. 465; Heck v. Ledwidge, 25 Ill. 109; Smith v. McLean, 123 id. 210, 14 N. E. 50; 12 Am. & Eng. Ency. of Law, 741)."

recover the agreed rent of $——— per month, less a reasonable estimate for defendant's damages occasioned by such destruction of buildings or structures.[16]

§ 1236. **Condition of Basement Concealed Fraudulently—Liability for Rent.** If the jury find from the evidence that the basement had, before the execution of the lease, been a wet cellar, and the plaintiff knew this fact, but fraudulently concealed it from defendant at the time of making the contract, and that the basement afterwards became wet, and its condition injurious to the health of defendant and its agents,—in other words, a nuisance,—and that defendant, through reasonable fears of injury to health, abandoned the premises on that account, then defendant would not be liable for rent, and the jury should answer the issue, "No." But if the jury should not find from the evidence that the basement had been a wet cellar before, or that plaintiff had knowledge of it and concealed it from the defendant, or if they should believe that the condition of the basement became a nuisance, or that defendant left the premises through reasonable fears of injury to health, but on some other account, then they should answer the issue, "Yes," and, in that event, should find what amount is due.[17]

§ 1237. **Action for Rent—Lease Taken in Name of Tenant's Agent.** The court instructs the jury that, if they believe, from the evidence, that W. entered into the lease in evidence with the plaintiff X. in his own name, and at the time of signing and execution of said lease it was understood and agreed that said lease was being executed for the Company then in process of becoming incorporated, and that said Company after becoming incorporated moved into the premises so demised, occupied and paid rent to the said X. at the rate mentioned in said lease, and that said X. recognized said Company as her tenant, then the jury are instructed that they should find the issues for the plaintiff.[18]

§ 1238. **Receipt for Rent—Presumption as to Back Rent.** It is a presumption of law where a tenant shows a receipt for rent that all previous rent has been paid to his landlord; and the jury are instructed that if they believe from the evidence that the defendant ——— has introduced a receipt or paid a check indorsed by the plaintiff, which they are instructed is equivalent to a receipt, for the rent of the premises in question for the month of ———, then they are instructed that, the presumption of law is that the rent for said premises for all back months was paid, and they will find for the de-

16—Richmond Ice Co. v. Crystal Ice. Co., 103 Va. 465, 49 S. E. 650 652, 663).

17—Gaither v. Hascall-Richards S. G. Co., 121 N. C. 384, 28 S. E. 546 (547).

18—Crystal W. S. Co. v. Roseboom, 91 Ill. App. 551 (553).

"We see no error in this instruction. On the contrary, it seems to us to be carefully prepared; to fairly present the question of

fendant, unless they shall believe from the evidence that such presumption has been removed by competent evidence.[19]

§ 1239. Right of Landlord to Enter for Condition Broken—Leased for a Particular Purpose—Forfeiture. (a) The court instructs the jury that the lease introduced in evidence gave the plaintiff the possession of the store in question, "to be occupied for a grocery store and for no other purpose whatever" and that the plaintiff had no right to use the premises for any other purpose, or for the purpose of a store room. And if the jury believe from the evidence that before the time it is claimed the defendant entered the store rented to the plaintiff, as charged in the declaration, the plaintiff had ceased to occupy the premises as a grocery store and was not occupying the same or intending to occupy the same as a grocery store after the time the plaintiff so ceased to occupy them, then the defendant had the right to enter said store and take possession thereof.[20]

(b) The court instructs the jury as a matter of law, that if the jury believe from the evidence that the plaintiff, ———, violated the terms and conditions in the lease under which he occupied the premises in question under the defendants, then by the terms of the lease the defendant had a right to remove the plaintiff or his employes and property, using no unnecessary force, the plaintiff cannot recover in this action.

(c) The court instructs the jury that the plaintiff is only entitled to recover the actual damage he has sustained, as may be shown by the evidence, which was the direct result of the wrongful conduct of the defendants, if the jury believe from the evidence that the defendants were not warranted in declaring the lease forfeited by reason of the default of the plaintiff.[21]

§ 1240. Written Lease—All Prior Agreements Merged—Altering or Varying Terms. The court further instructs you in regard to the

fact upon the evidence, and to state the law correctly."

19—Ottens v. Krug Brewing Co., 58 Neb. 331, 78 N. W. 622 (623).

"There can be no question about the correctness of the general proposition that a receipt for rent covering a particular month affords presumptive evidence that rent previously accruing has been paid. Decker v. Livingston, 15 Johns. 479; Brewer v. Knapp, 1 Pick. 332 (Mass.); Patterson v. O'Hara, 2 E. D. Smith, 58."

20—White v. Naerup, 57 Ill. App. 114 (118).

"Can there be a doubt that the intent of the parties was that the appellee should have the store if he occupied it as a grocery store, and otherwise he should not have it?

"And the intent governs. Kew v. Trainor, 150 Ill. 150, 37 N. E. 223. The above instruction should have been given.

" 'To be occupied as a grocery store' means, not that the premises are to be used as a place to store groceries, but a place where the trade of selling groceries was to be conducted; and that the trade had been discontinued is indisputable.

"This court has gone back to the common law, as held in Hoots v. Graham, 23 Ill. 81, that a trespasser or a person in possession as a wrongdoer can not recover against the owner of the fee, with right of possession. Frazier v. Caruthers, 44 Ill. App. 61; and more at large in Harding v. Sandy, 43 Ill. App. 442; and see Mueller v. Kuhn, 46 Ill. App. 496."

21—Schaefer v. Silverstein, 46 Ill. App. 608 (609).

lease in question that all prior and contemporaneous agreements respecting and leasing are merged into the written lease, and no prior or contemporaneous agreement can alter or vary the terms of the written lease offered in evidence.[22]

§ 1241. **Tenant Cannot Deny Landlord's Title—Proper to Define—Purpose and Object of Evidence.** You are instructed that a tenant cannot deny the landlord's title to premises which he obtains by virtue of his lease. The shed or annex which W. built and attached to defendant's planing mill became a part of said mill, and the ground on which it stood became a part of defendant's premises, so far as W. and his mortgagee, the plaintiff, are concerned. You are therefore instructed to disregard all of the testimony about the boiler and engine being in the alley, except so far as it has a bearing, if any at all, upon the question of whether said boiler and engine were trade fixtures or not.[23]

§ 1242. **Heating of Apartments—Death of Child by Failure of.** Unless the jury believe and can say from the evidence that the alleged failure of the defendant to supply steam heat, if there was such a failure, has something to do with the death of the child (meaning plaintiff's intestate) by way of bringing about such death, you should find the defendant not guilty.[24]

§ 1243. **Surrender of Premises—How Effected—Must be Assented to by Landlord.** (a) In respect to the alleged surrender of the premises, the court instructs the jury, that a valid surrender of a lease, and of the estate thereby created, can only be made by a mutual agreement, or assent of the landlord and tenant, to that effect.[25]

(b) The jury are instructed, that no surrender of the premises in

22—"This instruction correctly states the law." Munson v. Herzog, 109 Ill. App. 302 (305).

23—Brownell v. Fuller, 60 Neb. 558, 83 N. W. 669.

"We find no valid objection to this instruction. Counsel, if we understand them rightly, contend that the idea of the court is not clear from the language used, and implied that it had no bearing at all. If the instruction was not entirely satisfactory, counsel should have tendered one free from the uncertainty existing in the one given. Home Fire Ins. Co. v. Decker, 55 Neb. 346, 75 N. W. 841; C. B. & Q. R. Co. v. Oyster, 58 Neb. 1, 78 N. W. 539. But we do not think the instruction merits the criticism urged against it. It was proper for the court to direct the jury as to the purpose and object of the evidence as to the location of the machinery in dispute. Without an instruction of the kind given the jury would probably have entered into a consideration of the case with a view of its disposition upon the question as to whether the property was on defendant's lot, and, if not, then he could have no valid claim to it. . . . As between the parties, for all other purposes, its location in the alley made no difference. It belonged to, and formed a part of, the leased premises. Bliss v. Whitney, 9 Allen 114, 85 Am. Dec. 745; Arnold v. Crowder, 81 Ill. 56, 25 Am. Rep. 260; Redlon v. Barker, 4 Kan. 445, 96 Am. Dec. 180; Haider v. Insurance Co., 671 Minn. 514, 70 N. W. 805, 5 L. R. A. 594; McGorrish v. Dwyer, 78 Iowa 279, 43 N. W. 215, 5 L. R. A. 594."

24—O'Donnell v. Rosenthal, 110 Ill. App. 225 (228).

25—Nelson v. Thompson, 23 Minn. 508; Morgan v. Smith, 70 N. Y. 537; Ladd v. Smith, 6 Oreg. 316.

question, by the defendant, could take effect unless the plaintiff, by himself or by some authorized agent, accepted such surrender; and although the jury may believe, from the evidence, that the defendant vacated the premises in controversy, and gave notice thereof to the plaintiff, yet this alone would not exonerate the defendant from the payment of rent thereafter, unless the surrender was assented to by the plaintiff, as a surrender of the possession to him.[26]

§ 1244. Surrender of Premises—Moving Away—Giving Up the Keys. The jury are instructed, that although they may believe, from the evidence, that the defendant moved away from the premises in question, and sent the keys of the building to the plaintiff, and that the plaintiff retained the keys, this alone would not constitute a surrender of the premises by the defendant, and an acceptance of such surrender by the plaintiff.[27]

§ 1245. What Constitutes Eviction—Forcible Expulsion Not Necessary. (a) The court instructs the jury, that some acts of interference by the landlord with the tenant's enjoyment of the premises may be mere acts of trespass, or they may amount to an eviction. The question whether they partake of the latter character depends upon the intention with which they are done, and the character of the acts. If they clearly indicate an intention on the landlord's part that the tenant should no longer continue to hold the premises, and he thereby loses the beneficial use of the same, this would constitute an eviction; otherwise they would amount to no more than acts of trespass.[28]

(b) To constitute an eviction the acts of interference by the landlord with the tenant's possession must clearly indicate an intention, on the part of the landlord, that the tenant shall no longer continue to hold the premises, or some material part thereof.[29]

(c) Forcible expulsion is not necessary to cause an eviction; any act done in violation of the rights of the tenant without his consent, which deprives him of the beneficial use and enjoyment of a material part of the premises leased, will amount to an eviction; if the jury in this case believe, from the evidence, that the plaintiff, after making the lease, without the consent of the defendant, took possession of any material part of the premises leased, then the defendant is released from the payment of all rent accruing after that date.[30]

§ 1246. Eviction from Part of the Premises—Extinguishment of All Rent. (a) If you believe, from the evidence, that the defendant

26—Taylor's Land. and Ten. (9th Ed.) § 515; Wray-Austin Mchy. Co. v. Flower, 140 Mich. 452, 103 N. W. 873.

27—Townsend v. Albert, 3 E. D. Smith 560; Withers v. Larrabee, 48 Me. 570; Smucker v. Grinberg, 27 Pa. Super. Ct. 531.

28—Haynes et al. v. Smith, 63 Ill. 430, 14 Am. Rep. 124; Taylor's Land. and Ten. (9th Ed.) § 380; Myers v. Gemmel, 10 Barb. 537; Hazlett v. Powell, 30 Penn. St. 293; Mirick v. Hoppin, 118 Mass. 582.

29—Morriss v. Tillson, 81 Ill. 607; Arkley v. Union Sugar Co., 147 Cal. 195, 81 Pac. 509.

30—Townsend v. Albert, 3 E. D. Smith 560; Royce v. Guggenheim, 106 Mass. 201, 8 Am. Rep. 322.

was a tenant of the premises at the time in question, under a lease from the plaintiff, and that against defendant's consent, and without any understanding or agreement permitting it, the plaintiff took possession of any material part of said premises and evicted the defendant therefrom, and prevented him from using and occupying the same, then such eviction worked an extinguishment of all rent for the whole of said premises from the time such eviction occurred, notwithstanding the defendant continued to occupy a portion of said premises after that time.[31]

(b) Although the jury may believe, from the evidence, that the defendant has never been disturbed in, or evicted from, the main building on the leased premises, and that he has had the use and enjoyment of the same, still, if they further believe, from the evidence, that the plaintiff has taken possession of any material part of the premises leased without the consent of the defendant, this in law is an eviction, and the defendant is not bound to pay any rent, during the time of such eviction, for the part of the premises which he did use and occupy.[32]

§ 1247. Wrongful Eviction—Right to Procure Warrant—Malice—Probable Cause. (a) By the plea of justification the defendants admit that they procured the warrant described in plaintiff's declaration, and that under it plaintiff was dispossessed of the property in question in the manner as alleged—that is to say, by the constable in H. county; and the law casts upon them the burden of showing that they had the right to procure said warrant to dispossess the plaintiff, and this they must do to your reasonable satisfaction, by a preponderance of evidence.

(b) Before you can find damages against the defendants in this case, you must find that the dispossessory warrant was procured maliciously and without probable cause, both concurring.

(c) Did the defendants procure this warrant and dispossess the plaintiff without probable cause, and with malice? If they did, and you find the other issues for the plaintiff, they would be liable to him for damages, and it would be your duty to so find.[33]

31—Price v. P., Ft. W. & C. Ry. Co., 34 Ill. 13.

32—Taylor's Land. & Ten. (9th Ed.) § 378; Walker v. Tucker, 70 Ill. 527; Lewis v. Payn, 4 Wend. 423; Colburn v. Morrill, 117 Mass. 262; Day v. Watson, 8 Mich. 535; Skaggs v. Emerson, 50 Cal. 3.

33—Mitchell et al. v. Andrews, 94 Ga. 611, 20 S. E. 130.

Note.—For Landlord's Lien see chapter on Mortgages and Liens.

CHAPTER LVIII.

LIMITATIONS—STATUTE OF.

See Erroneous Instructions, same chapter head, Vol. III.

§ 1248. Statute of Limitations Defined—When it Begins to Run. (a) The statute of limitations is sometimes called a "statute of repose"—a statute to quiet possession. A statute of limitations does not originate in the idea of its being a title, but it is in law a trespass, begins as a trespass; and if one goes and takes possession of real estate and holds it openly and notoriously, and the true owner fails to assert his rights, then the law says you are barred, you have slept on your rights and on your title, and you cannot bring this action, if he has held it for the statutory period, then the defendant would be entitled to possession.[1]

(b) As regards the defense of the statute of limitations interposed in this case, the jury are instructed, that if one person gives credit to another until he gets into a certain condition financially, or until the happening of a certain event or contingency, then a cause of action will not arise until the party gets into such financial condition, or until such event or contingency has happened; and the statute of limitations does not begin to run until the cause of action has arisen, that is, until a suit could be brought for the debt.[2]

§ 1249. Running Accounts—When the Right of Action Accrues. (a) The court instructs the jury, as a matter of law, that in the case of running accounts between parties, the date of the last trans-

1—Sudduth v. Sumeral, 61 S. C. 276, 39 S. E. 534, 85 Am. St. Rep. 883.

2—3 Page on Contracts, § 1650; 2 Par. on Cont. 370; see Bradley v. Cole, 67 Ia. 650, 25 N. W. 851, note.

action, which was properly the subject matter of entry in such account, or the date when such item became payable, is the time at which the right of action accrues for the recovery, by either party, of any balance remaining due on such accounts.[3]

(b) If there be mutual running accounts between parties, and there is any item for which a credit or a charge could be properly made within (five) years before bringing suit, or where a payment has been made by one of the parties upon the account within (five) years, such credit, charge or payment is evidence of a promise implied by law to pay the balance of such account. And, in such case, a suit for such balance, if brought within (five) years after such credit, charge or payment, is not barred by the statute of limitations.[4]

§ 1250. **Mutual Running Accounts—Statute Runs from the Last Mutual Item.** If you believe from the evidence, that there are mutual running accounts between the parties, and involved in this suit, and that any items thereof were created in favor of the respective parties within (five) years prior to the commencement of this suit, then the statute of limitations should not be allowed as a bar against any part of such accounts, whether for plaintiff or defendant. And, in such case, it is immaterial whether such demands, or any part thereof, consist of book accounts, or rest merely in memory; neither is it material in such case, whether any or all of such demands consist of money loaned, goods furnished, labor performed, or for board or rent. In either case the whole of such accounts should be taken into consideration by the jury, without reference to the statute of limitations.[5]

§ 1251. **When Statute is Suspended by Absence from the State—Fraud and Deceit.** (a) You are instructed, that if a party is residing within this state when the cause of action against him accrues, then, in order that his absence from the state shall suspend the operation of the statute, it must appear not only that he has left the state, but also that he resides out of the state.[6]

(b) The court instructs the jury, that in the case of a claim or demand founded on fraud or deceit, the statute of limitation does not begin to run until after the fraud and deceit are discovered by the injured party.[7]

§ 1252. **Debt Revived by New Promise—What is Not a Promise.** (a) The jury are instructed, that where there has once been a legal

3—Bradley v. Cole, 67 Ia. 650, 25 N. W. 852, note.

4—Burch v. Woodworth, 68 Mich. 519, 36 N. W. 721.

5—Angell on Lim. § 147; 3 Page on Contracts, § 1655; 2 Greenleaf Ev. § 445; Carpenter v. Plagge, 192 Ill. 82, 61 N. E. 530; Padden v. Clark, 124 Ia. 94, 99 N. W. 152; Hannon v. Engleman, 49 Wis. 278, 5 N. W. 791.

6—(Ill. Statute.) Bradley v. Cole, 67 Ia. 650, 25 N. W. 857, note.

But see Bemis v. Ward, — Tex. Civ. App. —, 84 S. W. 291, where a change of residence is held not necessary. Absence on business or pleasure held sufficient.

7—McAlpine v. Hedges, 21 Fed. Rep. 689; Odell v. Burnham, 61 Wis. 562, 21 N. W. 635.

obligation to pay, and it has become barred by the statute of limitations, the moral obligation to pay the debt is a sufficient consideration to support a subsequent promise to pay; and in this case, though the jury may find, from the evidence, as to any of the plaintiff's demands, that the same were once due from the defendant, but that the cause of action accrued more than (five) years prior to the commencement of this suit, yet, if the jury further find, from the evidence, that the defendant has, within the said period of (five) years, promised the plaintiff to pay such debt, then, as to such demand, the jury should find for the plaintiff.[8]

(b) If the jury believe, from the evidence, that upon the occasion referred to by the witnesses, the defendant said, ("that account is correct,") or, ("I received the money,") or ("I had the goods,") or ("that is my note,") this would not alone amount to a promise to pay the debt.[9]

§ 1253. **Continuous Account or Service—Statute Runs from the Last Item.** (a) The jury are instructed, that where all the items of an account are on one side, the fact that some of them are within —— years before the commencement of the action will not take the others of longer standing out of the operation of the statute of limitations, and in such case only the items of account that have accrued within six years can be recovered for. But it is otherwise when the items of account are for work and labor done continuously upon an entire contract, if one of the items be within the period of limitations, all are saved.

(b) The jury are instructed, that against an account for work and labor done under an agreement for payment, not specifying at what time such payment should be made or how long such labor should continue or be performed, the statute of limitations does not commence running until the labor ends. Therefore, if the jury believe from the evidence that the plaintiff performed labor for the defendant's intestate, under an agreement to be paid therefor, without specifying at what time such payment should be made or how long such labor should continue or be performed, then the statute of limitations would not commence running until such labor was ended.[10]

8—Bradley v. Cole, 67 Ia. 650, 25 N. W. 857, note; Koons v. Vauconsant, 129 Mich. 260, 88 N. W. 630, 95 Am. St. Rep. 438.

9—Ayers v. Richards, 12 Ill. 146; 3 Page on Contracts, sec. 1675, and cases there cited.

10—Knight v. Knight, 6 Ind. App. 268, 33 N. E. 456.

The court in comment said that the "contention of the appellant is that these instructions were wrong because the statute of limitations prevented a recovery for more than six years preceding the death of said X. The service was continuous for nearly 20 years. When the service ended, the statute began to run. That the instructions correctly stated the law is unquestionable, and so well settled as to require no citation of authority in their support."

§ 1254. **Giving Credit Voluntarily upon an Outlawed Account Does Not Save the Running of the Statute.** If you find that there was no understanding or agreement in regard to the credit of the fifteen dollars, then it does not avail as a payment to take this claim out of the statute of limitations, to prevent its being barred, because the parties must agree upon the payment. The plaintiff cannot, by giving credit upon an account,—upon an outlawed bill, or a bill that may be outlawed,—for the purpose of preventing the running of the statute, make a credit, of his own volition, on that account, and save the running of the statute. He cannot do so unless it is agreed between the parties that there is to be an application upon the account, and that is a question for you to determine, whether or not it was understood between the parties that such a credit was to be made to X., and that it was to be credited upon that account, and properly applied upon it.[11]

§ 1255. **Adverse Possession—Estoppel—Statute Does Not Run Against Infants and Lunatics.** (a) If those who have an interest in the land—a claim of any kind in the land—sit silently by, and let others set up their claims, and take possession for ten years, as to such people the law would turn a deaf ear, and will not hear them. They have lost the right of action. They came too late into court.

(b) You heard the expression in argument about a statute "running"; that the statute will not "run" or will "run." That is a technical term, very plain to the members of the bar, but not so plain to intelligent jurors. But when the expression is used that the statutes will run against some parties it means that the time of the commencement of the ten years is referred to; that the operation of the statute is having its effect; and, if the statute runs for ten years, then the barrier is complete, and the defense is established. It will not, of course, run against those who are unable to stop it, because people can stop the running of a statute. Those who have a claim for the land can assert their claims during the ten years, and, if they do so, they will stop the running of the statute against them. Some cannot, in law, stop it. An infant—one under age—cannot. A lunatic could hardly do so. And also a party as you have heard spoken of as remainder-man of a life estate may not be able to do so until the death of the life tenant. The statute, therefore, does not run against every person. It runs only against those who could, if they would, stop it. It could not run against those who legally have not the power to stop it, which shows that the law will take care of those only who cannot take care of themselves.[12]

(c) The jury are instructed, that under the statute of this state

11—Bay City I. Co. v. Emery, 128 Mich. 506, 87 N. W. 652.

12—Sutton v. Clark, 59 S. C. 440, 38 S. E. 150 (153), 82 Am. St. Rep. 848.

(twenty years) of continuous, exclusive, uninterrupted, and adverse possession of real estate, not only has a right of action therefor, but it also confers a complete title as a written conveyance, against every one who is not under legal disabilities during any part of such time.[13]

§ 1256. **Adverse Possession—When Statute of Limitation Runs Against Minors—Married Women.** (a) If you believe, from the evidence, that the defendant took possession of the thousand-acre survey of land, of which the land in controversy is a part, as explained in the main charge, prior to the year ——, the date of the death of Mrs. K.——, then you are charged that the cause of action, if any, accrued to the children of the said Mrs. K. at the date of her death and their plea of minority will not avail anything in this case.

(b) You are charged that, if you believe, from the evidence, that the defendant took possession of the thousand-acre survey of land, of which the land involved in this suit is a part, as explained in the main charge, prior to the date of the decree of court dissolving the bonds of matrimony between J. Y., formerly F., and her then husband, A. F., then you are charged that her right of action, if any, accrued to her on the date of such decree of divorce, and her plea of coverture will not avail her anything from the date of such decree of divorce.[14]

§ 1257. **Devisee Has No Better Title than Devisor.** If S.'s right of action to recover the land from C. in his own lifetime was barred by the statute of limitation, then he had no right to leave the land or devise the lands in his will; and, if he did so, then his devisee could not set up any higher claim than S. himself.[15]

§ 1258. **Adverse Possession—Computation—Limitation—Life Estate Intervening.** If the statute began to run in the lifetime of S., no life estate intervening would stop its currency; and if the defendants,

13—Root v. Beck et al., 109 Ind. 472, 9 N. E. 698 (699).

"This instruction is said to be faulty in not stating that adverse possession, in order to confer title in fee, under the statute of limitations, must be under color of title. While conceding that color of title is not necessary to constitute an adverse holding, so as to bar an action under the statute of limitations, appellant's counsel nevertheless contend that, in order to acquire a title in fee by adverse possession, the occupancy must have been under claim or color of title. Some of the earlier cases seem to recognize the distinction contended for. The later decisions, however, leave little room for contention. An open, notorious, exclusive and uninterrupted adverse possession, continued for the period of 20 years, is effectual to confer a complete title on the person so occupying, and it is not essential that such possession should have been under color of title. State v. Portsmouth Sav. Bank, 106 Ind. 435-461, 7 N. E. Rep. 379; Sims v. City of Frankfort, 79 Ind. 446; Brown v. Anderson, 90 Ind. 93, and cases cited; Hargis v. Inhabitants, etc., 29 Ind. 70; Bauman v. Grubbs, 26 Ind. 419."

14—Yarborough v. Mayes, — Tex. Civ. App. —, 91 S. W. 624.

15—Sutton v. Clark, 59 S. C. 440, 38 S. E. 150 (155), 82 Am. St. Rep. 848.

or those under whom they claim, held adversely for ten years, which holding began during the lifetime of S., plaintiff's action would be barred. The point for you to decide is, if they held possession, did that possession take place or begin during the lifetime of S.? A different law would apply if it began after. But if it began during his lifetime, and was kept up continuously for ten years, part of the ten years being during his life and part after his death, then no life estate intervening would stop the running of the statute.[16]

16—Sutton v. Clark, supra.

CHAPTER LIX.

MALICIOUS PROSECUTION.

See Erroneous Instructions, same chapter head, Vol. III.

§ 1259. **What Must Be Proved.** (a) Before the plaintiff will be entitled to recover anything, he must prove, by a preponderance of the evidence, (1) that the plaintiff was charged with the crime of embezzlement; (2) that he was arrested upon said charge; (3) that he was tried and acquitted upon said charge; (4) that the defendants,

or such as are held liable, caused the arrest of the plaintiff, or were instrumental therein, or in some way voluntarily aided or abetted in the prosecution of the plaintiff; (5) that such prosecution was malicious and without probable cause.[1]

(b) If the jury believe, from the evidence, that the defendant had probable cause to believe that the plaintiff was guilty of the offense charged against him, then it is not material whether the defendant was actuated by proper or improper motives in instituting the criminal proceedings against the plaintiff. To authorize a recovery in this class of cases it must not only appear that the defendant was actuated by malice, but the jury must further believe, from the testimony, that the defendant had no probable cause, or no reasonable ground, to believe that the plaintiff was guilty of the offense charged against him. And the court further instructs the jury, that probable cause means a reasonable ground of suspicion, supported by circumstances in themselves sufficiently strong to warrant a reasonably cautious and prudent man in the belief that the person accused is guilty of the offense charged.[2]

§ 1260. **Probable Cause Defined.** (a) If you believe, from the evidence, that defendant had probable cause to institute the criminal proceedings, then the plaintiff cannot recover in this suit; and probable cause is defined to be reasonable ground for suspicion, supported by circumstances sufficiently strong themselves to warrant an impartial and reasonably prudent man in the belief that the person accused is guilty of the offense with which he is charged.[3]

(b) Probable cause has been defined to be such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe or entertain an honest and strong suspicion that the person arrested is guilty. . . . Whether the facts known to the defendant were such as to lead him, as a man of ordinary caution and prudence, to believe and entertain an honest and strong suspicion that plaintiff was guilty of either charge is submitted to the jury, to be decided as a question of fact.[4]

(c) By the term probable cause is meant the existence of such facts and circumstances as would excite the belief in a reasonably

1—Evansville & T. H. R. Co. v. Talbot, 131 Ind. 221, 29 N. E. 1134 (1135).

"To this instruction the appellants object because, they say, it 'assumes that some of the defendants will be held liable.' We do not think the objection is well founded. In our opinion, the instruction is unobjectionable when it is read, as it must be, in connection with the other instructions given. By its sixth instruction, the court charged the jury as follows: 'Your verdict in this case, if the facts warrant it, may be against some of the defendants and in favor of the others; but there can be no finding against any defendant who is not shown to have been connected with the instigation or carrying on of the prosecution.'"

2—Ames v. Snider, 69 Ill. 376; Flickinger v. Wagner, 46 Md. 580; Josselyn v. McAllister, 22 Mich. 300; Carey v. Sheets, 67 Ind. 375.

3—Smith v. Zent, 58 Ind. 362.

4—Eggert v. Allen, 119 Wis. 625, 96 N. W. 803 (805-6).

prudent man's mind, acting on the facts or information within the knowledge of the complaining witness at the time that the person charged was guilty of the crime for which he was prosecuted.[5]

(d) That to constitute probable cause for a criminal prosecution, there must be such reasonable grounds of suspicion, supported by circumstances, sufficiently strong in themselves, to warrant an ordinarily prudent man in the belief that the person arrested is guilty of the offense charged.[6]

§ 1261. What is Sufficient to Show Probable Cause—Settlement of Transaction on Which Criminal Suit was Based. (a) Probable cause for instituting a criminal prosecution is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a reasonably prudent cautious man in the belief that the person accused is guilty of the offense charged.[7]

(b) Even if the lease was not authorized or ratified, if the plaintiff, in going upon the premises, acted under an honest belief of right so to do, then a prosecution therefor would not be well founded; and, if defendant knew that plaintiff so acted, then the prosecution would be without probable cause, the same as it would if the lease had been authorized or ratified. If, on the other hand, the lease was not authorized or ratified, and the defendant had reason to believe, from a talk had with plaintiff with reference to a settlement of damages claimed by defendant, or from other matters, that the plaintiff knew that his claim to the premises was unfounded, but persisted, against the objections of defendant, in going upon the premises in question, then the defendant would have probable cause for instituting the prosecutions.[8]

5—Stoecker v. Nathanson, 5 Neb. (Unof.) 435, 98 N. W. 1061 (1064).

"In the case of Tucker v. Cannon, twice examined by this court, 28 Neb. 196, 44 N. W. 440 and 32 Neb. 444, 49 N. W. 435, the only instruction given on the question of probable cause, was one general in its nature, and of similar purport to the fifth instruction in the instant case. In this case there was judgment for the plaintiff, and the judgment was affirmed, and at the rehearing the instruction was approved, and the court clearly indicated that the rule of review in cases of this nature was the same as in other civil cases."

6—Cooley on Torts, 3d Ed. 321 et seq.; Farnam v. Feeley, 56 N. Y. 451; Winebiddle v. Porterfield, 9 Penn. St. 137; Collins v. Hayte, 50 Ill. 353; Fagnan v. Knox, 66 N. Y. 525.

See also McClafferty v. Philip, 151 Pa. St. 86 (90), 24 Atl. 1042, where the word "cautious" was held error, the proper word to be used being "prudent."

7—Galloway v. Burr, 32 Mich. 332; Ames v. Snider, 69 Ill. 376; McClafferty v. Philip, supra. See preceding section.

8—Noble v. White, 103 Iowa 352, 72 N. W. 556 (558).

"Appellant contends that, as no lease was pleaded or put in evidence, it was error for the court to recognize the existence of a lease. The undisputed evidence showed the existence of a lease, and it was not error for the court to recognize that fact in the instructions. . . . . Appellant insists that it was error to instruct that, if plaintiff acted upon an honest belief of right to occupy the premises, then the prosecutions were not well founded, for the reason that plaintiff's belief could not influence the action of the defendant in bringing the prosecutions. This claim ignores the fact that in the same connection the court said:

(c) If you believe from the evidence in this case that the facts and circumstances upon which the complaining witness, S., in the criminal case based his action in the prosecution of the plaintiff, were such as to excite the belief in a reasonably prudent man's mind, acting on such facts and circumstances as is shown from the evidence were within the knowledge of the said complaining witness at the time said prosecution was instituted, that the plaintiff N. was guilty of, the crime charged, and for which he was prosecuted, then there was probable cause for his arrest; or if you find from the evidence that plaintiff N. for the purpose of terminating the criminal cause, and preventing the due prosecution of the same, settled or consented to the settlement of the transaction on which said criminal suit was based, then in either event you should find for the defendant S. in this case.[9]

§ 1262. **What Is a Want of Probable Cause.** (a) If the jury believe, from the evidence, that the defendant instituted a criminal proceeding against the plaintiff, as charged in the declaration, and if they further find, from the evidence, that there were no circumstances connected with the transaction, out of which the prosecution grew, and that no information regarding it came to the knowledge of defendant, which would warrant a reasonable and prudent man in believing that the plaintiff was guilty of the charge made against him, then there was no probable cause for the prosecution.[10]

(b) The court instructs you that both the questions of probable cause and malice, as well as the questions of the prosecution by the defendant and its termination in acquittal or discharge of the plaintiff, are questions for the jury to determine and find from the evidence.

(c) Probable cause for a criminal prosecution is understood to be such conduct on the part of the accused as may induce the jury to infer that the prosecution was undertaken for public motives.[11]

§ 1263. **Dismissal of Civil Suit Prima Facie Evidence of Want of Probable Cause.** The court instructs the jury that the bringing and dismissal of the suits in the manner in which they were brought and dismissed is prima facie evidence of the want of probable cause, but is not conclusive evidence of the want of probable cause; and if the jury believe from all the evidence and circumstances as exist,

'If the defendant knew he so acted, then the prosecution would be without probable cause;' thus making defendant's knowledge an element of the injury."

9—Stoecker v. Nathanson, 5 Neb. (Unof.) 435, 98 N. W. 1061.

10—McWilliams v. Hoben, 42 Md. 56; Harpham v. Whitney, 77 Ill. 32.

11—Lewton v. Hower, 35 Fla. 58, 16 So. 616 (617, 618).

"The definition given was not the fullest and most complete which might have been given, yet it was one approved by courts of great respectability. Ulmer v. Leland, 1 Greenl. 135, 10 Am. Dec. 48 and cases cited in note to Bell v. Graham, 9 Am. Dec. 691; Bitting v. Ten Eyeck, 82 Ind. 421, 42 Am. Rep. 505. If defendant was dissatisfied with the definition given, it was his duty to have proposed a better definition."

and, as shown by the evidence, excuse the bringing and dismissal of the cases, and that there was in the defendant's mind a well-grounded belief, and that he had probable cause to believe the facts as testified to by him, then the plaintiff is not entitled to recover.[12]

12—Kolka v. Jones, 6 N. D. 461, 71 N. W. 558 (563), 66 Am. St. Rep. 615.

The above instruction was given in an action brought for malicious prosecution, in which the alleged malicious prosecution consisted in bringing three successive civil suits before a Justice of the Peace upon the same claim, each case being voluntarily dismissed by the plaintiff (defendant in this case) when the day of the trial arrived. The court said: 'We find no error in this. It is well settled that the voluntary dismissal of a suit is prima facie evidence of want of probable cause.' Wetmore v. Mellinger, 64 Iowa 741, 18 N. W. 870, 52 Am. Rep. 465; Burhans v. Sanford, 19 Wend. 417; Nicholson v. Coghill, 4 Barn. & C. 21; Green v. Cochran, 43 Iowa 544; Cooley, Torts, page 185. Such dismissal, unexplained, is as cogent evidence of want of probable cause as the failure of the prosecutor in a criminal action to make out a sufficient case to satisfy a committing magistrate. And yet it has been repeatedly held that the discharge of the plaintiff in the malicious prosecution action by a committing magistrate is prima facie evidence of want of probable cause. Cooley Torts, page 184; Bigelow v. Sickles, 80 Wis. 98, 49 N. W. 106, 27 Am. St. Rep. 25; Barhight v. Tammany, 158 Pa. 545, 28 Atl. 135, 38 Am. St. Rep. 853; Brown v. Vittur, 47 La. 607, 17 So. 193; Smith v. Association, 116 N. C. 73, 20 S. E. 963; Newell Mal. Pros. p. 283. But it is urged that the statute law in this case gives the plaintiff in an action an absolute right to dismiss it at any time before it is finally disposed of, and that, therefore, such a dismissal cannot be held to constitute even prima facie evidence of want of probable cause. Counsel for appellant asserts that such a rule of evidence would take away the plaintiff's absolute right to dismiss his action. But the most superficial consideration of the matter will suffice to show the unsoundness of this reasoning. The rule of evidence which we uphold and apply in this case is one which creates a mere presumption. It does not purport to render illegal that which, both under the statute and at common law, is strictly lawful. If the plaintiff has probable cause for commencing his suit, the dismissal thereof will not render actionable the institution of such suit. It will merely call upon him to show that there was in fact probable cause for bringing the action. And it is entirely reasonable that the voluntary discontinuance by a party of an action which he absolutely controls should, in an action of this character, shift the burden of proof. To establish want of probable cause is to prove a negative, and it is elementary that to prove a negative requires only slight evidence. See Newell, Mal. Pros. p. 282, para. 7.

At the threshold of the case we are met with the contention that for the malicious institution and prosecution of a civil action without probable cause there is no remedy, unless the person of the defendant in such an action has been arrested or his property seized therein, or unless there exist special circumstances removing the case from the category to which belong ordinary civil actions. On this very interesting question we find the decisions in hopeless conflict. In this jurisdiction it is an open question, and we shall therefore settle it upon principle and in accordance with the weight of argument, without reference to the number of authorities which can be arrayed upon the opposite sides, respectively, of this controversy. It may not be amiss, however, to remark that in our opinion the scales in which are balanced the relative weight of authority on this point have turned, and that now it is no longer true, as erstwhile it was, that the adjudications preponderate in favor of the English rule, that in the absence of the arrest of the person or of the seizure of property or of other special circumstances, the successful defendant has no remedy, despite

§ 1264. **What May be Admitted in Evidence to Show Want of Probable Cause.** The court instructs you that it was proper to introduce the proceedings of the county commissioners relating to the establishment of the alleged highway, * * * and from all the facts and circumstances as shown by the evidence, it was for the

the fact that his antagonist proceeded against him maliciously and without probable cause.

Favoring the English doctrine, we find the following authorities: Potts v. Inlay, 4 N. J. Law 377; Mayer v. Walter, 64 Pa. St. 289; Eberly v. Rupp, 90 Pa. St. 259; McNamee v. Minke, 49 Md. 122; Wetmore v. Mellinger, 64 Iowa 741, 18 N. W. 870, 52 Am. Rep. 465; Mitchell v. Railroad, 75 Ga. 398; Ely v. Davis, — N. C. —, 15 S. E. 878; Terry v. Davis, 114 N. C. 31, 18 S. E. 943; Rice v. Day, 34 Neb. 100, 51 N. W. 464; Gorton v. Brown, 27 Ill. 489, 81 Am. Dec. 245.

Opposed to the English rule, we marshal decisions from the states of Connecticut, New York, Minnesota, Kansas, Kentucky, Missouri, Colorado, Ohio, Louisiana, Michigan, Tennessee, Indiana, Vermont, Massachusetts and California: Lipscomb v. Shofner, 96 Tenn. 112, 33 S. W. 818; McCardle v. McGinley, 86 Ind. 538, 44 Am. Rep. 343; Lockenour v. Sides, 57 Ind. 360; McPherson v. Runyon, 41 Minn. 524, 43 N. W. 392, 16 Am. St. Rep. 727; Closson v. Staples, 42 Vt. 209, 1 Am. Rep. 316; Whipple v. Fuller, 11 Conn. 582, 29 Am. Dec. 330; Marbourg v. Smith, 11 Kan. 554; Cox v. Taylor's Admr., 10 B. Mon. 17; Pangburn v. Bull, 1 Wend. 345; Eastin v. Bank, 66 Cal. 123, 4 Pac. 1106; Woods v. Finnell, 13 Bush. 629; Allen v. Codman, 139 Mass. 136, 29 N. E. 537; Smith v. Burrus, 106 Mo. 94, 16 S. W. 881, 27 Am. St. Rep. 329, 13 L. R. A. 59; Johnson v. Meyer, 36 La. Ann. 333; Hoyt v. Macon, 2 Colo. 113; Brady v. Ervin, 48 Mo. 533; Antcliff v. June, 81 Mich. 477, 45 N. W. 1019; 21 Am. St. Rep. 533; 10 L. R. A. 621; Pope v. Pollock, 46 Ohio St. 367, 21 N. E. 356, 15 Am. St. Rep. 608; Brand v. Hinchman, 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep. 362; O'Neill v. Johnson, 53 Minn. 439, 55 N. W. 601, 39 Am. St. Rep. 615; Dolan v. Thompson, 129 Mass. 205; Sartwell v. Parker, 141 Mass. 405, 5 N. E. 807.

* * * Without at this point adverting more particularly to the facts, we will dispose of the question whether the action will lie, assuming the suit to have been maliciously brought without probable cause. We wish to settle the law in this state, not upon the peculiar features of this case, but upon the broad basis that the malicious prosecution of a civil action without probable cause is a legal wrong for which the law will afford redress, without reference to any inquiry touching the seizure of property, the arrest of the person, or other special circumstances. Before the statute of Marlbridge (52 Hen. III) an action for the malicious prosecution without probable cause of a mere civil action would lie. Closson v. Staples, 42 Vt. 209-214, 1 Am. Rep. 316; Lockenour v. Sides, 57 Ind. 364; Lipscomb v. Shofner, 96 Tenn. Sup. 112, 33 S. W. 818; Pope v. Pollock, 46 Ohio St. 367, 21 N. E. 356, 15 Am. St. Rep. 608, 4 L. R. A. 255, 14 Am. & Eng. Enc. Law. 32. Why this rule should have been departed from after the act of 52 Hen. III had been passed, is apparent from the language of that act. It gave to the defendant who had prevailed in the cause, not merely his costs, but also his damages; and, to make apparent the purpose of parliament to substitute this remedy for the action for malicious prosecution, these costs and damages were given only in actions which were malicious, and not at all in actions generally. Railroad Co. v. McFarland, 44 N. J. Law 674-676.

Subsequent legislation in England shows that the statute of Marlbridge was enacted not as a general law regulating costs, but to afford a summary remedy to the successful defendant in place of the existing right of action to recover his damages on account of the malicious prosecution of a civil action against him. The statute of Gloucester (6 Ed. I, c. 1) gave the defendant costs where he recovered damages, and finally, by the act of 23 Hen. VIII, c. 15, the defendant was given costs in all

jury to determine, not whether there was a legal highway within the limits of which the overseer was engaged in removing an obstruction, but whether these defendants honestly believed, and had reason to believe, that such was the fact—in other words, whether there

cases in which he was successful whether he recovered damages or not, provided the case was one in which the plaintiff could have recovered costs had he been the prevailing party. Railroad Co. v. McFarland, supra.

The act of the British Parliament which was held to take away the existing cause of action for damages for the malicious prosecution of a civil suit was an act which in terms was limited to cases of that kind; and when it is remembered that it gave the defendant not merely his costs but also his damages, it is obvious that the statute was framed to give the successful defendant his remedy in the very case in which he was maliciously prosecuted, instead of compelling him to seek redress in an independent action. Between such legislation and the statutory enactments of this country on the subject of costs, there is the widest possible difference. The statute of Marlbridge was limited to civil actions maliciously prosecuted, and gave the defendant the damages he had suffered because of such perversion of the forms and remedies of the law, whereas the statutes regulating costs on this side of the water are not restricted to actions in which the motive prompting the litigation was unjustifiable, but are intended to apply to all cases, to the end that some indemnity to the other suitor may be afforded in every case, independently of the state of mind of the person bringing the suit, on the question whether he had reasonable ground for believing that the action could be maintained; leaving the remedy for a perversion of legal machinery to the common-law maxim that for every wrong the law will give legal redress. General statutes regulating costs make no discrimination between the honest suitor, who, having a valid claim, may yet fail, for some reason, to establish it in court, and the malignant persecutor and harasser of a citizen, who, by his abuse of legal forms, causes heavy damage to such citizen, in property, reputation and business prospects, by the unfounded suit, which he who institutes it knows full well he cannot maintain. Each must pay the statutory costs, and the same rule measures the liability of each for such costs. That our meager bill of costs was intended to recompense the victim of the malicious prosecution of a civil suit is, to our minds, unthinkable. It is true that our statute gives the successful suitor a right to recover some trifling items of costs, and certain specified disbursements, as indemnity; but it is indemnity for the defense (in the case of a defendant) of an action, without reference to the question whether there has been a malicious perversion of legal remedies. If it was enacted to cover cases of an abuse of legal machinery, then it is evident that all remedy for such an abuse was intended to be withheld; for, in such a view of the statute, he who lawfully uses and he who maliciously perverts the right to sue would stand upon precisely the same footing with respect to the question of liability for their respective acts. Even when the plaintiff has acted in the utmost good faith the defendant will often suffer on account of the suit, damages which taxable costs will not even approximately compensate. But it is the policy of the law not to throw around the right of the citizen to appeal to the courts for redress such risks that fear of the possible consequences will deter him from asserting a claim he honestly deems himself entitled to enforce. In ordinary cases, the injury a defendant suffers, beyond the slight indemnity which statutory costs afford him, is one of the many inevitable burdens which men must sustain under civil government. He is forced to bear it for the public good. A wise policy requires that the honest claimant should not be frightened from invoking the aid of the law by the statutory threat of a heavy bill of costs against him in case of defeat. But certainly no policy

was probable cause for instituting criminal proceedings against the plaintiff. Although it may now appear that the plaintiff was not guilty of any offense, for the reason that there was no legally established highway, * * * although it may appear in this action that she was utterly innocent, the defendants cannot be held liable for her arrest unless it appears from the evidence that there was as to them a want of probable cause; and the burden is upon the plaintiff to show by a fair preponderance of the evidence both want of probable cause and that the prosecution was malicious.[13]

§ 1265. What Negatives the Idea of Want of Probable Cause. (a) If the jury believe, from the evidence, that the defendant, when he instituted the prosecution complained of, honestly believed the plaintiff was guilty of the offense charged, and that defendant's belief was founded on a knowledge of circumstances tending to show such guilt, and sufficient to induce, in the mind of an ordinarily reasonable and prudent man, the belief in such guilt, then such belief on the part of the defendant negatives the idea of the want of probable cause.[14]

(b) If the jury believe, from the evidence, that the defendant, when he instituted the prosecution complained of, honestly believed the plaintiff was guilty of the offense charged, and the defendant's belief was founded on a knowledge of circumstances tending to show guilt, and sufficient to induce in the mind of an ordinarily reasonable, prudent man the belief in such guilt, then such belief on the part of the defendant negatives the idea of the want of probable cause.[15]

§ 1266. What Defendant Believed When He Made Complaint and Not the Guilt or Innocence of Plaintiff the True Inquiry. Upon the question, whether the defendant had probable cause for commencing, etc., the jury are instructed, that the true inquiry for them to answer is not what were the actual facts as to the guilt or innocence of the plaintiff, but what did the defendant have reason to believe, and what did he believe in reference thereto, at the time he made the complaint.[16]

demands that malice should, by the assurance of protection in advance, be encouraged to vex, damage and even ruin a peaceful citizen by the illegal prosecution of an action upon an unfounded claim.

* * * The malicious prosecution of legal remedies to subserve unworthy personal ends is not only an injury to the victim of the particular persecution, but also to society at large, if it is suffered to go unwhipped of justice. If the law will not punish such conduct, public confidence in the merits of our system of jurisprudence must inevitably be shaken, and the courts themselves will seem to have forsaken their high function as protectors and vindicators of invaded rights, and to have become, instead, the accomplices of evil men."

13—Richardson v. Dybedahl, 17 S. D. 629, 98 N. W. 164 (166).

14—Hirsch v. Feeney, 83 Ill. 548; Brennan v. Tracy, 2 Mo. App. 540.

15—Schattgen v. Holnback, 149 Ill. 646 (652), 36 N. E. 969.

16—Galloway v. Burr, 32 Mich. 332.

§ 1267. Malice Defined—Charge Must Be Willfully False. (a) Malice is defined as any indirect motive of wrong; . . . and, in the legal sense, any unlawful act which is done willfully and purposely to the injury of another, is, as against that person, malicious; and by malice is meant not the act but the motive which prompts the act. It consists of a bad motive, or such reckless disregard of the rights of others as to show evil intent. It is an action based upon an improper motive, and does not necessarily presuppose personal hatred, ill will or revenge. The improper motive or want of proper motive inferable from a wrongful act based upon no reasonable ground constitutes of itself all the malice deemed essential in law to the maintenance of the action. The malice necessary to be shown in order to maintain this action is not necessarily revenge or other base and malignant passion; whatever is done willfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is, in legal contemplation, malice. If, however, the accused is in fact guilty of the offense charged, that would be a complete defense in this action, and it would be immaterial whether the proceedings complained of were malicious or not.[17]

(b) To sustain the charge of malice, the criminal charge must appear, by a preponderance of the evidence, to have been willfully false. To sustain a suit for malicious prosecution, the facts ought to be such as to satisfy any unprejudiced, reasonable mind that the accused had no ground for the prosecution, except his desire to injure the accused.[18]

§ 1268. When a Prosecution Is Malicious—Malice Immaterial if Probable Cause Is Proved. (a) Malice may consist of any motive other than a desire to bring a guilty party to justice. A prosecution is malicious when actuated by hostile or vindictive motive, provided there is also a lack of probable cause, as is hereinafter explained. A prosecution instituted willfully and purposely, to gain some advantage to the prosecutor, or through mere wantonness, or carelessness, if it be at the same time wrong and unlawful, within the knowledge of the actor, and without probable cause, is, in the legal contemplation, malicious.[19]

(b) The mere failure of the prosecution (that is, the suits brought by these defendants against this plaintiff) does not establish a want of probable cause. To maintain the present actions, the plaintiff must satisfy the jury by a preponderance of evidence of the existence of the two essential elements of his case, viz.: (1) that the defendants acted maliciously in bringing the suits against the plaintiff; (2) that the defendants acted, in bringing the suits against

17—Miles et al. v. Walker, 66 Neb. 728, 92 N. W. 1014 (1016). "There seems nothing of which defendants can complain in this instruction. Most of it is to be found approved in Tucker v. Cannon, 32 Neb. 445, 49 N. W. 435."

18—Harpham v. Whitney, 77 Ill. 32.

19—Eggert v. Allen, 119 Wis. 625, 96 N. W. 803 (805-6).

the plaintiff, without probable cause. The question of probable cause does not depend upon whether the plaintiff was guilty of the offense charged in the defendants' writs, but depends wholly upon the defendants' honest belief of the plaintiff's guilt, based upon reasonable ground. The defendants were at liberty to act upon the appearances; and, if the apparent facts were such that a discreet and prudent person would be led to the belief that the plaintiff had done the acts complained of, the defendants are not liable in this action, and your verdict will be for the defendants, although upon the whole evidence you may believe that the plaintiff did not do the acts complained of, and that the defendants were mistaken in their belief that he did. If there was probable cause for the actions brought by the defendants, of which cause the defendants were informed, at the time they brought the actions, the justification is complete, and it is immaterial whether the defendants were actuated by malice or not.[20]

§ 1269. Not Permissible to Testify Directly to the Existence of Malice. The court charges the jury that malice cannot be testified about by V. & Co., whether it existed, but the law is that the jury must look at the circumstances bearing on the inquiry, the circumstances of the issuance and levy of the attachment, and the conduct of the defendants in instituting the attachment suit.[21]

20—Cohn v. Saidel, 71 N. H. 558, 53 Atl. 800.

In approving the instruction the court said that "the defendants' request that the jury be instructed that the mere failure of the prosecution (that is, the suits brought by these defendants against this plaintiff) does not establish a want of probable cause, should have been granted. The failure of those suits, though necessary to be proved, was but a short step toward the maintenance of an action for malicious prosecution. Shaw, C. J., in Cloon v. Gerry, 13 Gray 201. In every case of an action for malicious prosecution or suit, it must be averred and proved that the proceeding instituted against the plaintiff has failed; but its failure has never been held to be evidence of either malice or want of probable cause; much less, that it is conclusive of those things. Strong, J., in Stewart v. Sonneborn, 98 U. S. 187, 195, 25 L. Ed. 116. In determining the question of probable cause—the most vital point in the case—it is manifest that the jury would be very likely to give great weight to the failure of the defendants' suits against the plaintiff, and therefore that the defendants were entitled to and should have received the benefit of the instruction requested. Not only was this denied them, but the jury were left wholly uninstructed on this point, and free to draw such inferences as to them might seem proper, and which could not well be otherwise than highly prejudicial to the defendants."

21—Vandiver & Co. v. Waller, 143 Ala. 411, 39 So. 140.

The court said "it is true that it is not permissible for a party to testify directly as to the existence or not of malice. Malice as a motive which inspires the action of a person, when necessary to be shown, must be gathered from a consideration of all the evidence in the case bearing upon the inquiry. Four letters written by Vandiver & Co. were offered in evidence—two of them by the plaintiff and two by the defendant—which the appellants insist shed light upon the question of malice. It is insisted by appellants that the charge given at the request of the plaintiff prohibited the jury from considering either of the letters on the question of malice. We do not so con-

§ 1270. Prosecution for Purpose of Collecting Private Debt Is Abuse of Process—Would Also Be Conclusive Evidence of Malice. (a) The jury are instructed, as a matter of law, that the commencement of a criminal prosecution, simply for the purpose of collecting a debt or private claim, is an abuse of the process of the court, and would be conclusive evidence of malice on the part of the person commencing such proceeding, and in such case the advice of counsel would be no protection. Whether in this case the proceedings were commenced against the plaintiff with a bona fide intention of prosecuting a supposed criminal offense or merely for the purpose of securing a private claim, are questions to be determined by the jury, from the evidence.[22]

(b) If the criminal prosecution was commenced for the purpose of collecting a debt due defendant from plaintiff, or for the purpose of punishing plaintiff for not paying said debt, and not for the purpose of vindicating the law and punishing crime, then from such facts you will be justified in finding that said criminal prosecution was commenced by defendant from malicious motives.[23]

(c) The court instructs the jury that if the defendant knew that his only remedy was in a civil action, and willfully or recklessly commenced the criminal prosecutions, this would show malice, although the defendant was in fact entitled to the possession of the premises; and malice would especially be shown if the defendant had in fact authorized ———— to lease the premises upon the terms upon which it was leased by the latter, but, by reason of having got a better offer on the land, instituted the criminal prosecutions for the purpose of forcing the plaintiff to abandon the land in question.[24]

strue the charge. It may be that the charge was misleading in this respect, but, as we have repeatedly said in this opinion, the fact that a charge has a misleading tendency will not render the giving of it error unless it clearly appears that the jury were misled by it to the prejudice of the party against whom it was given. We cannot say that the jury was misled to the prejudice of the defendants by the charge. The defendants, by asking an explanatory charge, could have protected themselves from the supposed misleading tendencies of the charge."

22—Livingston v. Burroughs, 33 Mich. 511.

23—Clark v. Forlkers, 1 Neb. (Unof.) 96, 95 N. W. 328 (329).

24—Noble v. White, 103 Iowa 352, 72 N. W. 556 (558).

"Appellant contends that there is no evidence that there was a better offer on the land, but we think otherwise. Appellant also complains of that part of the instruction to the effect that if defendant knew that his remedy was in a civil action, this would show malice in commencing the criminal prosecutions. It is insisted that his remedy was not a civil action; but, be that as it may, one or more of the counsel whom he consulted so advised him, and the inquiry is as to the knowledge under which he acted. It is claimed that the court erred in saying that there could be malice in bringing the prosecutions, 'although the defendant was in fact entitled to the possession of the premises.' Taken alone this might be error, but taken in its connection it is not. It was bringing the prosecutions knowing that his only remedy was in a civil action that shows malice, even if he was entitled to possession."

§ 1271. The Jury May, But Need Not Necessarily Infer Malice From Want of Probable Cause. (a) The jury are instructed, that while the law is, that they may infer malice from the want of probable cause for the institution of the criminal prosecution against the plaintiff, if they believe, from the evidence, that such prosecution was commenced without probable cause, still, the jury are not bound to infer malice from that fact. The law is, that malice may be, but it is not necessarily, inferred from want of probable cause for the commencement of a criminal prosecution.[25]

(b) The court instructs the jury, that if they believe, from the facts and circumstances proved on this trial, that defendant had not probable cause for prosecuting the plaintiff, and that he did prosecute him, as charged in the declaration, then the jury may infer malice from such want of probable cause.[26]

(c) If you believe, from the facts and circumstances as given in evidence, that the defendant had not probable cause for the arrest and imprisonment of the plaintiff, then and in such case you may infer malice from such want of probable cause.[27]

§ 1272. Want of Probable Cause Cannot Be Inferred from Proof of Malice, But May Be Considered—May Also Consider Delay in Commencing Prosecution. (a) Though probable cause cannot be inferred from malice, yet in determining whether there was or was not probable cause, the fact that there was ill will or malice may be considered.

(b) The jury may consider, as tending to support the action, delay in commencing the prosecution after the alleged commission of the offense, and in bringing said prosecution to a trial after it was commenced.[28]

(c) The court instructs the jury, that in order to sustain the action for malicious prosecution, it must be proved, by a preponderance of the evidence, that the prosecution complained of was made with malice, and also without probable cause; and if both these requisites are not so proved, the jury should find for the defendant.[29]

(d) The court instructs the jury, that want of probable cause, though negative in its character, must be shown by the plaintiff, by

25—Panket v. Livermore, 5 Ia. 277; Smith v. Howard, 28 Ia. 51; Lunsford v. Dietrich, 86 Ala. 250 (253), 5 So. 461, 11 Am. St. Rep. 37; Cooley on Torts (3d Ed.), 337.

26—Cooley on Torts (3d Ed.) 337; Ewing v. Sanford, 19 Ala. 605; Harkrader v. Moore, 44 Cal. 144; Pankett v. Livermore, 5 Clarke (Ia.) 277; Krug v. Ward, 77 Ill. 603; Holliday v. Sterling, 62 Mo. 321; Carson v. Edgeworth, 43 Mich. 241, 5 N. W. 282; Wertheim v. Altschuler, 12 Neb. 591, 12 N. W. 107.

27—Roy v. Goings, 112 Ill. 662; Merrell v. Dudley, 139 N. C. 57, 51 S. E. 777.

28—Evansville & T. H. R. Co. v. Talbot, 131 Ind. 221, 29 N. E. 1134 (1135).

29—Cooley on Torts (3d Ed.), 335; Legallee v. Blaisdell, 134 Mass. 473; Casperson v. Sproule, 39 Mo. 39; Center v. Spring, 2 Clarke (Ia.) 393; Heyne v. Blair, 62 N. Y. 19; Skidmore v. Bricker, 77 Ill. 164.

affirmative evidence, and the jury have no right to infer it from any degree of malice which may be proved.[30]

§ 1273. **Not Necessary that a Crime Should Have Been Committed.** The court instructs the jury, that to justify an arrest on a criminal charge, it is not required that a crime shall in fact have been committed. If the facts which come to a person's knowledge are such as to create a belief that a crime had been committed by the person charged, in the mind of an impartial, reasonable man, this would be sufficient to constitute probable cause for making an arrest, although no crime had in fact been committed.[31]

§ 1274. **The Prosecution Must Be Ended.** The jury are instructed, that in order to maintain an action for malicious prosecution, it must appear, from the evidence, that the alleged malicious prosecution has been legally terminated. Striking the case from the docket, on motion of state's attorney, with leave to reinstate the same, is not a legal termination of the prosecution.[32]

§ 1275. **Acquittal Before Justice of the Peace—No Indictment by Grand Jury.** (a) The court instructs the jury that the fact that the grand jury ignored the information, and that defendant was acquitted before the justice of the peace, is no evidence of want of probable cause, but the testimony on this point is only admitted to show that the prosecutions in question have ended.[33]

(b) That the fact that the plaintiff was discharged by the justice of the peace before whom he was brought, upon the charge made against him, is not such evidence of a want of probable cause as will alone sustain an action for a malicious prosecution.[34]

§ 1276. **Person Beginning Criminal Prosecution Must Exercise Care of an Ordinarily Prudent Man.** (a) The jury are instructed that it does not depend upon whether or not the person so prosecuted was actually guilty of the crime, but whether or not an ordinarily prudent and careful man under the facts as they appeared to him in the exercise of reasonable care to ascertain the facts, or from the knowledge or honest belief of the facts then had, would be justified in the honest belief that a crime had been committed, and the person accused was guilty of such crime.

(b) The jury are instructed that if the defendant in bringing the prosecution did not use the means which an ordinarily careful and prudent man would exercise under like conditions to ascertain

30—Brown v. Smith, 83 Ill. 291; Boyd v. Cross, 35 Md. 194; Cottrell v. Richmond, 5 Mo. App. 588; Lavender v. Hodgins, 23 Ark. 763; Smith v. Zent, 59 Ind. 362; Evens v. Thompson, 12 Heisk. 534.

31—Flickinger v. Wagner, 46 Ind. 580.

32—Blalock v. Randall, 76 Ill. 224; Clark v. Cleveland, 6 Hill 344; Cardinal v. Smith, 109 Mass. 159; Leever v. Hammill, 57 Ind. 423; Lamprey v. Hood & Sons, 73 N. H. 384, 62 Atl. 380.

33—Noble v. White, 103 Iowa 352, 72 N. W. 556 (558).

34—Thorpe v. Balliett, 25 Ill. 339; Scott v. Dewey, 23 Pa. Super. Ct. 396.

the facts connecting the plaintiff with the crime alleged to have been committed, and if you find from the facts and circumstances as they, at the time, were known or appeared to the defendant that he was not justified in believing that the plaintiff had committed the crime for which he was afterwards arrested, then such proceedings would have been commenced without probable cause.[35]

§ 1277. **Collusion and Conspiracy to Incarcerate Plaintiff—Damages.** The burden of proof is upon the plaintiff to satisfy your minds by a preponderance of evidence that the defendants wrongfully conspired and colluded with each other to have the plaintiff incarcerated in the lunatic asylum, unlawfully and against her will, each defendant acting his part maliciously, wantonly, and out of a spirit of reckless disregard for the rights and liberties of the plaintiff, and with intent to injure the plaintiff in her reputation and character and standing before the people, and that she was in fact thereby damaged; and that, if the evidence fails to satisfy your minds, you should find for the defendants upon this allegation in the declaration; but that it should not of itself bar recovery for actual damages, if the jury should believe from the evidence that the plaintiff is entitled to recover actual damages.[36]

§ 1278. **Maliciously Swearing Out Search Warrant.** If the jury believe from the evidence that the defendant caused or procured the premises of the plaintiffs in question to be searched and that such search was unreasonable, malicious, and made without probable cause, then the jury will find the defendant guilty.[37]

§ 1279. **Advice of Counsel.** (a) There is evidence tending to show that F. acted as attorney for the defendant in the proceedings before B. Of course, the defendant is liable if he either commenced these prosecutions himself or authorized and directed his attorney to do so, if in other respects the cause of action stated in the complaint is proved. Now, even if the signature to this complaint is not defendant's, yet if the defendant was there counseling and advising the prosecution of the plaintiff, and taking part in maintaining the prosecution, he would be just as liable as if he signed the complaint. However, you may consider the question whether he signed the complaint, and what he supposed as to the

35—Walker v. Camp, 63 Iowa 630, 19 N. W. 802; Flam v. Lee, 116 Iowa 289, 90 N. W. 70 (73), 93 Am. St. Rep. 242.

"It is said that the language imposes too high a degree of care upon a person beginning a criminal prosecution. We think the criticism is not well founded. All that is required of an informant in criminal proceedings by this instruction is that he shall exercise the care of an ordinarily prudent man. This is not too high a standard of action for the governing of one who is about to institute a prosecution which if not well founded, may work incalculable injustice to an innocent person. The rule announced by these instructions we regard as in harmony with the well established principles in reference to actions for malicious prosecution."

36—Bacon v. Bacon, 76 Miss. 458, 24 So. 968 (970).

37—Spingold v. Tigner, 82 Ill. App. 337 (338).

nature of the proceedings, whether they were tort or criminal in their nature, as bearing on the question of malice.[38]

(b) If a party about to commence a criminal prosecution communicates to the state's attorney all the material facts affecting the question of the guilt of the party about to be accused, which are known to him, or of which he had notice, and then acts upon his advice, the presumption of malice is rebutted, and an action against him for malicious prosecution will fail.[39]

(c) If you believe, from the evidence, that the defendants instituted the criminal prosecution from a fixed determination of their own, rather than from the opinions of legal counsel, or that a full, fair and true statement of all the facts known to them was not submitted to the counsel, then, in either case, the opinion given by the counsel is no defense in this action, if you believe, from the evidence, that the criminal charge was false, and made without probable cause. Before the defendant can shield himself by the advice of counsel, it must appear, from the evidence, that he made, in good faith, a full, fair and honest statement of all the material circumstances bearing upon the supposed guilt of the plaintiff which were within the knowledge of the defendant, or which the defendant could, by the exercise of ordinary care, have obtained, to a respectable attorney in good standing, and that the defendant in good faith acted upon the advice of said attorney in instituting and carrying on the prosecution against the plaintiff.[40]

(d) The court instructs the jury, that whether or not the defendant did, before instituting the criminal proceedings, make a full, fair and honest disclosure to the attorney of all the material facts bearing upon the guilt of the plaintiff, of which he had knowledge, and which he could have ascertained by reasonable diligence, and whether, in commencing such proceedings, the defendant was acting in good faith upon the advice of his counsel, are questions of fact to be determined by the jury, from all the evidence and circumstances proved in the case. And if the jury believe, from the evidence, that the defendant did not make a full, fair and honest disclosure of all such facts to his counsel, then such advice can avail him nothing in this suit.[41]

(e) The court instructs the jury, as a matter of law, that when a party communicates to counsel in good standing all the facts bearing upon the guilt of the accused, of which he has knowledge, or could have ascertained by reasonable diligence, and in good faith

38—Eggert v. Allen, 119 Wis. 625, 96 N. W. 803 (806).

39—Calef v. Thomas, 81 Ill. 478; Andersen v. Frind, 71 Ill. 475; McCarthy v. Kitchen, 59 Ind. 500; Johnson v. Miller, 69 Ia. 562, 29 N. W. 743; Smith v. Austin, 49 Mich. 286, 13 N. W. 593.

40—Roy v. Goings, 112 Ill. 663; Logan v. Waytag, 57 Ia. 107, 10 N. W. 311; Porter v. Knight, 63 Ia. 365, 19 N. W. 282; Cooper v. Flemming, 114 Tenn. 40, 84 S. W. 801.

41—Roy v. Goings, 112 Ill. 663; Abel v. Downey, 110 Ill. App. 343.

acts upon the advice of such counsel in prosecuting the party accused, he cannot be held responsible for malicious prosecution.[42]

§ 1280. **Full Statement of Facts to Counsel.** (a) The court instructs the jury that the advice of counsel, to be of any avail to the defendant, must be given upon a full, fair and honest statement of all the facts known to the defendant, and must be honestly given by the attorney, or to be so understood by the defendant. If the defendant made false statements of the material facts to his attorney, or withheld material facts which were favorable to the plaintiff, then the advice of counsel would be of no avail to him in this action. If the attorney who advised the defendant to cause the arrest had an agreement or understanding with the defendant that the defendant could rely on the advice of counsel as a defense, and the defendant for that reason made the complaint, then the advice of counsel would be of no avail.

(b) The court instructs the jury that in order to show probable cause for the arrest of the plaintiff, the defendant, ———, is required to show his sincere belief that the plaintiff was guilty of the charge made, and such belief must be based upon such facts as would justify such a belief in the mind of a reasonable man. The discharge of the plaintiff by the examining magistrate is *prima facie* evidence of the want of probable cause, sufficient to throw upon the defendant the burden of proving the contrary. In this case it is not shown by the evidence that the defendant made any statement of the facts and circumstances connecting the plaintiff with the crime charged against him, but it appears that the defendant was present at the examination of the witnesses before Justice S. on a complaint against M., in connection with the district attorney, and that the defendant with the district attorney were both present when statements were made by R. as to the purchase of Paris green by the plaintiff, and perhaps other statements made by other parties. It is for you to determine from the evidence whether any other statement was made in regard to the connection of the plaintiff with this crime in the presence of the defendant and the district attorney. If the evidence given before Justice S. and the statements made by R. or other persons at the conclusion of such examination in the presence of the defendant and the district attorney would lead a cautious, reasonable, and prudent man, under similar circumstances, to honestly believe that the plaintiff was guilty of the offense charged against him in the complaint, and upon such evidence and statements the defendant was advised by the district attorney, in his official capacity, that there was good ground for making the complaint against the plaintiff for the offense charged, and, in pursuance

42—Josselyn v. McAllister, 22 Mich. 300; Brinsley v. Schulz, 124 Wis. 426, 102 N. W. 918; Andersen v. Frind, 71 Ill. 475; Ash v. Marlow, 20 Ohio 119; Walter v. Sample, 25 Pa. St. 275; Sharpe v. Johnson, 59 Mo. 557; Acton v. Coffman, 74 Ia. 17, 36 N. W. 774.

thereof, the defendant made this complaint, then the defendant is not liable.[43]

If you believe from the evidence that the prosecution against the plaintiff B., was instituted or participated in by the defendants, or any of them, and that the said prosecution was without probable cause, and not for motives affecting public interest, but for the purpose of defeating the claim, if any, which the said B. had or might have had upon the policy of insurance issued by the ——— Company upon the property belonging to the plaintiff which was consumed by fire, then you will find for the plaintiff against such of the defendants as you believe from the evidence participated in said prosecution or ratified the same, unless you find, under the instructions hereinafter given you, that said M. made a full and fair statement of all the facts within his knowledge concerning said fire to the county attorney of K. county, and that he advised or required the prosecution.[44]

43—Messman v. Ihlenfeldt, 89 Wis. 585, 62 N. W. 522 (523).

44—Brady v. Georgia H. Ins. Co., 24 Tex. Civ. App. 464, 59 S. W. 914 (915).

The comment of the court follows: "It may be said in this connection that in order to recover in a suit of this character the plaintiff must establish the concurrence of the following facts: First, that a criminal prosecution was instituted without probable cause therefor; second, that the motive in instituting it was malicious; and, third, that the prosecution has terminated in the acquittal or discharge of the accused. If it be shown that a criminal proceeding was instituted, but upon probable cause, it would not matter what may have been the underlying motive that caused action upon the part of the prosecutor. The motive may be of the basest character, and yet it cannot be made the foundation of an action, unless it be shown that no probable cause existed for the prosecution. As said by the court in the case of Griffin v Chubb, 7 Tex. 603: 'To maintain the action it was incumbent on the plaintiff to prove both the want of probable cause and malice. Neither alone is, in general, sufficient.' The question in cases of tort is whether or not the complaining party has suffered a legal wrong at the hands of the defendant, and the good or bad motive back of the action cannot make a right action wrong, or a wrong action right, in the eyes of the law. As said by Cooley in his work on Torts (page 832): 'Malicious motives cannot make a bad act worse, but they cannot make that a wrong which in its own essence is lawful.' To apply it to this case, if M. acted upon probable cause in making the affidavit against B., appellees are not liable, no matter if the object of the prosecution was to defeat payment of the insurance money. Citizens should be encouraged in enforcing the laws of the country, and should not be deterred from attempting to punish one whom they have probable cause to believe to be guilty, although their activity may be the outcome of sinister motives. It is the rule, it is true, that, to justify a prosecution on the ground that it was advised by an attorney, a statement of all the facts known to the prosecutor must be made in good faith, which would seem to contain the idea that motive might be of consequence in cases of malicious prosecution; but the matter of good faith refers, not to the object of the prosecution, but to the honest desire of the prosecutor to ascertain if the facts stated make out a case against the accused. 'It is to be presumed that the county attorney would not be influenced by any private spite or interest of the complainant, and that no citizen would be prosecuted by the public prosecutor, except upon what the office believed to be reasonable ground for

§ 1281. **Presumption from Good Character.** If the jury believe, from the evidence, that the plaintiff, up to the time of his arrest, uniformly bore a good reputation for honesty and integrity, and that defendant knew his reputation to be such up to the time of his arrest, then that fact is a proper one to be considered by the jury, in connection with all the other evidence in the case, in determining whether or not defendant had probable cause to believe, and did believe, in good faith, that the plaintiff was guilty of the crime charged against him.[45]

§ 1282. **Burden of Proof on the Plaintiff.** (a) The jury are instructed, that to warrant a conviction in this case, the plaintiff must not only prove malice, but he must also show that there was no probable cause for the prosecution in question; and the defendant is not bound to prove probable cause unless the plaintiff has introduced some evidence tending to show the absence of it. And though the jury may believe, from the evidence, that the plaintiff has shown malice on the part of the defendant, in causing the criminal prosecution in question to be commenced, still, if the jury further believe that the plaintiff has failed to show, by a preponderance of evidence, the want of probable cause, then the jury should find for the defendant.[46]

(b) In an action for malicious prosecution, the burden of proof is on the plaintiff to show that the defendant acted maliciously, and without any reasonable or probable cause.[47]

§ 1283. **Action for Malicious Prosecution—Admissions or Confessions of One Not Evidence Against Other Defendants to Prove Conspiracy.** (a) Any statements, declarations, admissions, or confessions that may have been made by X. in the absence of Y. and Z., since the termination of the prosecution of ————, cannot be considered by you as against Y. and Z.

(b) The alleged statements made by X. in the absence of Y. and Z., since the termination of the prosecution against ————, to the effect that he had been induced by Y. and Z., or either or them, to

such proceeding. It is, therefore, evident that, if the state has selected a proper officer to represent it, no malice of the informant can influence the prosecution, unless it be to suppress a part of the facts, or to state that which was not true, in which event, if knowingly done, he would not be protected from punishment by having secured the advice of the prosecuting attorney.' There was evidence tending to show that M. acted in good faith, and fairly and honestly communicated all the facts known to him to the county attorney, and that the latter determined that there was probable cause for the prosecution; and consequently the court did not err in submitting that issue to the jury, even though such charge had not been also asked by the appellant."

45—Woodworth v. Mills, 61 Wis. 44, 20 N. W. 728.

46—Cooley on Torts (3d Ed.), 334-337; 1 Hill. on Torts 416; Burton v. St. Paul, M. & M. Ry. Co., 33 Minn. 189, 22 N. W. 300; Dwain v. Descalso, 66 Cal. 415, 5 Pac. 903.

47—Calef v. Thomas, 81 Ill. 478; Fleckinger v. Wagner, 46 Md. 580; Brennan v. Tracy, 2 Mo. App. 540.

testify falsely on the ———— trial, cannot be considered by you as against Y. and Z.[48]

§ 1284. **Malicious Prosecution—Elements of—Series.** (a) In an action of this character, gentlemen, malice is the principal element. The ground of the complaint is an alleged malicious prosecution, and such an action may be brought to recover damages sustained by the plaintiff by the reason of his having been prosecuted for some crime or offense by a defendant or at the instance of the defendant, from malicious motives and without probable cause. There are three essentials which must concur before a malicious prosecution can be successfully maintained, and I ask your close attention to these three, that you may apply them as tests to the evidence in this case, and decide whether or not the plaintiff has made out his case; and upon all three the burden of proof is upon the plaintiff to establish each of the three and all three, by the preponderance of the testimony, so that the jury will be satisfied that each of the three has been proved: First, it must be affirmatively shown that the plaintiff was prosecuted through malicious motives; second, that the prosecution was without probable cause; and third, that the prosecution had ended, either by an acquittal or by a judgment in the plaintiff's favor, before the commencement of the action for damages, or that the prosecution had been abandoned, and the cause dismissed

48—Roberts v. Kendall, 3 Ind. App. 339, 29 N. E. 487.

"The court did not err in admitting the testimony objected to, for it was competent as against X. himself; but the court did err in refusing to give the above instructions asked by Y. and Z. . . . It is settled that when a conspiracy is once established, and until the consummation of the object in view, if the conspiracy last that long, every act and declaration of one conspirator in pursuance of the original concerted plan, and in reference to and in furtherance of the common object, even in the absence of others, is in contemplation of law the act and declaration of all, and is therefore original evidence against each. All are deemed to assent to or commend what is said or done by anyone in furtherance of the common project. Ford v. State, 112 Ind. 373, 14 N. E. 241; Moore v. Shields, 121 Ind. 267, 23 N. E. 89. But the existence or nature of a conspiracy cannot be established by the acts or declarations of one conspirator in the absence of the others, unless the acts or declarations were in themselves in execution or for the promotion of the common design. Clawson v. State, 14 Ohio St. 234. The declarations which are admissible are those which are made between the beginning and ending of the conspiracy for the promotion of the common criminal or evil purpose. If the conspiracy has not yet been formed or if it has ended by the consummation of the wrongful design, admissions or narrations of what has taken place are not admissible against those who were not present when the admissions were made. This rule is based upon familiar elementary principles of the law and sound reason. Ford v. State, supra; Moore v. Shields, supra; McKee v. State, 111 Ind. 378, 12 N. E. 510; People v. Parker, 67 Mich. 222, 34 N. W. 720, 11 Am. St. Rep. 578; Johnson v. Miller, 63 Iowa 529, 17 N. W. 34; State v. Weaver, 57 Iowa 730, 11 N. W. 675; Estes v. State, 23 Tex. App. 600, 5 S. W. 176; Armstead v. State, 22 Tex. App. 51, 2 S. W. 627; 3 Greenl. Ev. para. 94. The indictment and conviction of the appellee of the charge of arson was the object of the conspiracy. This failed, and the conspiracy must be held to have ceased when the object to be accomplished failed."

before the commencement of the action for damages. You will bear in mind that the burden of proof is upon the plaintiff to establish these three requisites as facts—not merely to establish one of them or two of them, but all three; and should he fail to satisfy the jury as to one of them, he could not and should not get a verdict, and the defendants would prevail. It is important therefore that the jury should clearly understand what is meant by "malice" in what is called a "malicious prosecution," and also to know what is meant by "want of probable cause" and to have a clear idea of what is meant in law, as a "termination of the prosecution," or an "abandonment of the prosecution;" and I shall endeavor to make these three essential requisites clear to you.

Malice Defined. (b) First then, as to malice. As technically used in legal definitions, malice is by no means the same as malice spoken of in common conversation, which usually means simply ill-will, hatred, animosity or some similar feeling. A man may prosecute another with the bitterest animosity, the fiercest hatred, a most violent ill-will, and yet be entirely free from the malice without which there can be no malicious prosecution, because malice in law is not simply a rancor of the mind. Envy, hatred, and malice are separate and distinct passions, and the worst of these is malice, because it is a deliberate purpose to do an injury to some person without just cause or excuse. I repeat it: Malice in law is the deliberate purpose to injure another without just cause or excuse. It means the willing act of an evil mind—the intention to wrong another unjustly. It implies the making up of the mind to do evil to some one. Therefore any indirect motive of wrong is a malicious motive. For example, if one sets the criminal law in motion against another, not for the purpose of bringing that other to justice for the violation of some law, but for the purpose, for instance, of aiding the prosecutor to collect a debt, a jury might well consider that that was evidence of a malicious motive, because the criminal law was not designed to aid creditors in the enforcement or payment of debts; and he who sets the criminal law in motion for such a purpose should smart for it, and in a proper case would be made to smart for it. I trust you clearly understand now what is meant by the malice which must be present as the motive in a malicious prosecution. That malice or malicious motive must be proved to the satisfaction of the jury by the greater weight of the testimony. It is not necessary that malice be expressly shown,—for instance by proof of threats or the like. Malice may be implied. It may be inferred from circumstances. For example, malice may be inferred in a prosecution, if the prosecution is one without probable cause. If the jury are satisfied from the testimony that the prosecution was wholly without cause, or without probable cause, that they may infer, and justly infer, that it was prompted by malice; that would be a presumption or inference; being merely a presumption may be removed and made to disappear from the case by suffi-

cient and competent testimony showing that even without probable cause there was no evil intention, no deliberate purpose to do wrong, no malice. It may have been on misinformation. But nothing else appearing, the want of probable cause would justify an inference of malicious intent, malicious motive. It is, of course, impossible to formulate and lay down any general rule, any rigid test, by which the question of what constitutes malice in a prosecutor may be determined. The question arises in each case, and must be decided by the circumstances in each individual case; and you alone can determine from the testimony in this case whether there was malice in the alleged prosecution, and you must determine that according to the testimony in the case. You alone can decide whether there was or was not malice in the alleged prosecution. But it is safe to say, and I so charge you, that the facts from which malice is found, the evidence by which malice is proved, must be such as to satisfy any reasonable man that the prosecutor had no ground for the prosecution except his evil desire to injure the accused.

Probable Cause and Want of Probable Cause. (c) So much then for malice. We now come to the second requisite in a malicious prosecution: that is want of probable cause. And I charge you that probable cause is such a state of facts and circumstances present in the mind of the prosecutor at the time of issuing warrant as to lead a man of ordinary intelligence and caution and prudence, acting conscientiously, fairly and without prejudice upon the facts as he believes them, or as he believes he knows them, to believe the person accused to be guilty. Probable cause therefore is something more than merely ground for suspicion, or even reasonable ground for suspicion. In addition to that there must be such an appearance of facts and circumstances as would warrant and justify a man of ordinary intelligence and caution and prudence in believing that the person accused was guilty of the offense or crime charged. Probable cause I would say, by way of illustration, is the measure of proof which justifies a grand jury in finding a true bill. That is to say, the existence, or the seeming existence of such facts and circumstances, as, nothing else appearing, would warrant a reasonable man and a prudent man, in believing that the person accused was guilty and should be tried. The state is bound to furnish a grand jury with probable cause, before that jury can find a true bill against a man. It does not mean that they try a man and find him guilty, but they simply say, "If this evidence be true" and only one side is heard, the state's side,—"If this evidence be true, this man should be tried; upon these facts, he must be guilty, if they be true." That furnishes probable cause. I have already said that the want of probable cause is an essential element in a malicious prosecution, and the plaintiff therefore is bound to prove that there was no probable cause for the prosecution. That looks like requiring him to prove a negative, which is supposed to be in logic a very difficult thing to do. It is almost equivalent to asking

a plaintiff to prove that he was innocent of the charge, and the law does not usually require a man to prove his innocence, but on the civil side of the court, when he alleges that he has been prosecuted from malicious motives, and that there was no ground for the prosecution, he must prove that there was a want of probable cause,—that the prosecution was without probable cause. It must be borne in mind, gentlemen, that proof of malice, no matter how strong, or complete or convincing, cannot take the place of proof of want of probable cause. Clear and satisfactory proof of malice will not supply the lack of proof of want of probable cause. And note this also, gentlemen: Want of probable cause must not be inferred or implied from proof of malice, although as I have already charged you, malice may be inferred from the want of probable cause. One who accuses another of crime may act upon appearances, and if the facts or what seems to him to be the facts, are such that a man of ordinary intelligence and caution and prudence, acting conscientiously and without prejudice, would under the circumstances be led to believe, or be warranted in believing, that the person accused was guilty, the accuser or prosecutor will be justified in such prosecution, even though the appearances had misled him, although they were in fact no just ground for prosecution. Because one may be deceived or misled by appearances, but if he has acted only under the effect of such misleading or deception, and even though the accused was innocent the accuser in such a case could not be justly held liable for damages for malicious prosecution, having acted upon appearances, and honestly acted upon appearances. But a prosecution based upon mere conjecture or suspicion, or groundless suspicion, would justly render a prosecutor liable for damages, because there must be reasonable ground for the suspicion and it must be strengthened by circumstances and facts, or what seemed to be facts, sufficiently strong to lead a man of ordinary prudence and intelligence to believe in the guilt of the accused. And this is right. No man should, with impunity, set the criminal law in motion against another, and deprive him of his liberty, even for a brief period upon slight suspicion or mere conjecture that he has committed the offense charged. Nor is it sufficient that the prosecutor should believe in the guilt of the accused. Mere belief is not sufficient to justify a criminal prosecution, because there must be reasonable or probable grounds for that belief. If there be probable cause it is immaterial what were the motives of the prosecution,—whether it was a desire to subserve the interests of public justice or to gratify private spleen or personal revenge, or any other improper motive. Clear proof of probable cause—of the existence of probable cause—makes it unnecessary to inquire further into the motives of a prosecution; and where probable cause exists, there can be no ground for a malicious prosecution. It is manifest, therefore, gentlemen, from all I have said, that this question of probable cause is a mixed question of law and fact. It is the duty of the court to define, as I have

endeavored to do, probable cause. It is the duty of the jury to apply the law to the facts in evidence, and determine the question, was there a want of probable cause, or did the probable cause exist?

Termination of or Abandonment of Charge or Prosecution. (d) The third requisite, which must concur with the other two as a basis to maintain an action for damages for malicious prosecution, is the termination of the prosecution or charge, or the abandonment of the charge or prosecution. As to this it is enough for the purposes of this case to charge you, in view of the evidence submitted, that if the accused has been arrested and committed, or held to bail for his appearance at court, and is discharged by the prosecuting attorney or solicitor without any true bill or any bill or any action by the grand jury whatever, that is a sufficient termination to meet the requirements of a complaint like this. This complaint alleges that the said charge, complaint and prosecution, and each of them are wholly ended and determined in favor of the plaintiff. It is not necessary, as I have just said, that the grand jury should have acted, or that they should have found no bill, or if they had found a true bill that the plaintiff should have been tried and acquitted. That would be a termination, but a verdict and judgment on the merits of the charge are not necessary. It is enough if the case has been dismissed by the court or abandoned by the prosecution, or if the case has been formally discharged by the solicitor or the case formally dismissed by the order of the court. That is a sufficient termination of the case to comply with the requirements of pleading in a complaint of this character.

Damages—Actual and Punitive. (e) The action is one for damages, and in a case of this nature, if the jury decide to find for the plaintiff (in other words if they decide that he has made out his case,—that he has been a victim of malicious prosecution), then they are not limited in estimating the damages to the actual damages proved or sustained, but they are at liberty in their sound discretion, if the facts proved justify it, to award exemplary punitive damages, as I have explained,—not as I said, to enrich the plaintiff, but, to a certain extent, to punish the defendant. The jury therefore are at liberty, in estimating damages, to allow for injury to reputation as well as to person and injury to credit in a business man to compensate for wrong and indignity suffered by a plaintiff, and to indemnity for wrong done to a plaintiff's feelings; and as to the amount of damages the jury is the sole and proper judge limited only by the amount claimed. In this case if you come to the conclusion that the plaintiff is entitled to damages, no matter if the plaintiff may satisfy the jury that he should be paid more, or that a larger sum than the amount claimed should be awarded, you cannot go beyond the amount claimed. That amount or any amount less, is wholly within the province of the jury to determine.

Probable Cause—Defense in Such Action. (f) My charge thus far has shown what is required to be proved by the plaintiff in a

case like this, and I have attempted to explain the theory of damages applicable to a case like this. I shall now add a few words as to the defense proper in an action of this character. It is a good defense, in an action of this character, that there was probable cause. If the evidence shows that there was probable cause, that ends the matter; the investigation may stop there, and the verdict should be for the defendants. So also the defense is complete if the action of the prosecutor (the defendant) was not the result of malice (if he was not actuated by malice) and the question of probable cause does not depend on whether the accused is guilty or innocent, but upon the belief of the prosecutor, and upon the grounds of that belief. It is quite conceivable that an innocent man may be prosecuted and prosecuted vigorously. It is also conceivable that the prosecutor may have acted towards that innocent man with hatred and ill will. But if the prosecutor, acting upon appearances, and believing honestly that the facts and circumstances justified him in considering the innocent person guilty,—in that case he could not be liable for damages for malicious prosecution—because he would not be actuated by malicious motives. I have already said more than once that a prosecutor is entitled to act upon appearances, and if the appearances be such that they would lead a man of ordinary intelligence and discretion to believe that the accused had committed the crime or the offense charged, in that case the prosecutor would not be liable in damages, even though the accused were wholly innocent. If, therefore, there be an honest belief in guilt, and there be reasonable grounds for such belief, the prosecutor will be justified, and not liable in damages. But mere belief in guilt standing alone, is no justification. There must be reasonable or probable grounds for the belief. And I charge you, if there was probable cause for the prosecution, the defendants cannot be held liable in damages, even though they were actuated by improper and malicious motives if there was probable cause. A defendant may defeat an action of this character by proving the existence of probable cause, or by proving that the prosecution was free from malice. It is obvious, therefore, that if probable cause is shown, the absence of malice need not be shown; but where there is a failure to prove probable cause, then proof of malice would be indispensable.

Advice of Counsel—Want of Improper Motive. (g) A good deal was said in your hearing about the advice of counsel in a case of this character—in advising the prosecutor. I charge you that a defendant in a case like this may endeavor to rebut the presumption of malice by proof that he acted under the advice of counsel. He is allowed to show that he communicated to his counsel, his lawyer, all the facts or what seemed to him to be the facts, bearing upon the guilt or innocence of the accused, which were known to him, or which he might reasonably have information of, and to show, also, that, acting upon his lawyer's advice, he brought the prosecution,

and that he acted solely on the advice of his counsel, and from no improper motives. That would be a complete defense and would justify the finding for the defendant in a proper case. You are to say whether this is such a case or not. The testimony is before you, and you are to say what weight it deserves. The whole advice of counsel is evidence intended to rebut the presumption or imputation of malice; but where malice is expressly proved, the advice of one's lawyer will not free a defendant from liability, that is, where malice is expressly proved.

(h) I have said that a defendant is allowed to show that he acted on the advice of counsel,—allowed to tell what he said to counsel as to facts, or appearance of facts, that induced him to bring the prosecution, and that he acted solely upon the advice of counsel and from no improper or evil motives, not the mere fact that he acted on the advice of counsel. That is not sufficient. It must be also shown that he acted on no improper motives. Advice of counsel is to go to the jury with all other evidence.[49]

FALSE IMPRISONMENT.

§ 1285. False Imprisonment—What Constitutes. (a) The court instructs the jury, that in order to sustain a charge for false imprisonment, it is not necessary for the plaintiff to show that the defendant used violence or laid hands on him, or shut him up in a jail or prison; but it is sufficient to show that the defendant, at any time or place, in any manner, restrained the plaintiff of his liberty, or detained him in any manner from going where he wished, or prevented him from doing what he wished; provided, this is done without legal authority, as explained in these instructions.[50]

(b) If the jury believe, from the evidence, that the defendant met the plaintiff at S., and took the plaintiff into his custody, and there kept him, and brought him to M. against his will, and offered to deliver him into the custody of the sheriff, then the defendant is guilty as charged in the declaration, and the jury should find for the plaintiff; unless the jury further find, from the evidence, under the instructions of the court, that the defendant was warranted in law in making such arrest, as explained in these instructions.[51]

(c) To constitute an arrest and imprisonment, it is not necessary that the party making the arrest should actually use violence or force towards the party arrested, or that he should even touch his body. If he profess to have authority to make the arrest and he

49—Baker v. Hornik et al., 57 S. C. 213, 35 S. E. 524 (527).

50—Cooley on Torts (3d Ed.), 297; Brushaber v. Stagemann, 22 Mich. 266; 2 Addison on Torts 697; Hawk v. Ridgway, 33 Ill. 473; Bonesteel v. Bonesteel, 28 Wis. 245; Harkins v. State, 6 Tex. App. 452; Murphy v. Martin, 58 Wis. 276, 16 N. W. 603; Gelzenleuchter v. Neimeyer, 64 Wis. 316, 25 N. W. 442.

51—Hawk v. Ridgway, 33 Ill. 473.

commands the person, by virtue of such pretended authority, to go with him, and the person obeys the order, and they walk together in the direction pointed out by the person claiming the right to make the arrest, this is an arrest and imprisonment within the meaning of the law.[52]

§ 1286. **Arresting Without Warrant—When It May Be Done—Probable Cause.** (a) In the case it is admitted by the defendant that he had no warrant for the arrest of the plaintiff. The laws of the state permit an arrest without a warrant or "on view" as it is sometimes termed, either (1) when a public offense is committed, or attempted in the presence of the officer; or (2) when a public offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it. It is claimed by defendant in his answer that he arrested plaintiff for the first cause,—that is, for a public offense committed or attempted in his presence; and unless this fact has been proven by him by a preponderance of the evidence, his plea of justification has failed, and justification at your hands cannot be made out upon any other ground than that set up by the defendant in his plea of justification.[53]

(b) The police have no more right than any other citizen to lay hands upon a citizen, where no felony is claimed to have been committed, nor no breach of the peace takes place in their sight; and, neither being claimed to have been committed in this case, plaintiff is entitled to recover, whether the plaintiff's or the defendant's evidence be taken to be true.[54]

(c) Whether the ring was actually stolen or not, if you believe from the evidence that the defendant had probable cause for believing it was stolen by plaintiff, then your verdict should be for defendant.[55]

§ 1287. **Submission to Threat Is Not a Consent to Restraint.** If you find from the evidence that the plaintiff remained in the store of L., W. & Co., on the evening and night of the ——— of ———, voluntarily and of her own free will and accord, then I charge you that this does not constitute an unlawful imprisonment as charged in the complaint. Submission to the threatened and reasonably apprehended use of force is not to be considered as a consent to the restraint by the one claiming to have been imprisoned.[56]

§ 1288. **False Imprisonment—Trespass on Land of Another.** (a) We have a statute in this state which provides that "Whoever unlawfully enters upon the lands of another, and severs from the soil any product or fruit growing thereon, the property of another, of

52—Cooley on Torts (3d Ed.), 297; 2 Addison on Torts § 799; Martin v. Houck, 141 N. C. 317, 54 S. E. 291.

53—Stewart v. Feeley, 118 Iowa 524, 92 N. W. 670 (671).

54—Zube v. Weber, 67 Mich. 52; 34 N. W. 264 (268).

55—Rich v. McInery, 102 Ala. 245, 15 So. 663 (664), 49 Am. St. Rep. 32.

56—Bingham v. Lipman, W. & Co., 40 Ore. 363, 67 Pac. 98 (101).

the value of ten cents or upward, upon conviction thereof shall be fined in any sum not exceeding one hundred dollars, to which may be added imprisonment in the county jail for not more than six months.'' As you will observe, the penalty provided by such statute is by way of fine not exceeding one hundred dollars, to which may be added imprisonment in the county jail for not more than six months; and I instruct you that, if the plaintiff were guilty of taking cherries from the defendant or defendants without their consent and against their will such offense would not be a felony. It would be what is known in law as ''criminal trespass.'' If the value of the cherries so taken amounted to ten cents or upwards, and would constitute a misdemeanor if it were committed by the plaintiff, the defendant would have no right to seize and tie plaintiff, and without any warrant or process confine him in the house of defendants against his will, unless it was reasonably necessary to do so for the purpose of preventing such act of trespass on his part.

(b) If you find from the evidence that the plaintiff at the time alleged was engaged in taking cherries from the tree of the defendants, without their consent, of the value of ten cents or less, such an act would be trespass on the part of the plaintiff; and if while he was taking such cherries the defendant discovered him, she would have the right to prevent such an act or trespass on the plaintiff's part, using such force as was reasonably necessary for that purpose. But if she used an excessive force to prevent such trespass, then she would be liable in damages for such excessive use of force, and if such act of trespass could have been prevented or if, when she discovered plaintiff committing such an act of trespass he discontinued the same and attempted to flee from the premises of the defendants, and it was not necessary for her to use any force to prevent the continuance of such trespass, then I instruct you that said defendant would have no right to seize the plaintiff, and bind him with rope, and confine him in the house of the defendants against his will, and if she did so she would be liable to the plaintiff.[57]

57—Golibart v. Sullivan, 30 Ind. App. 428, 66 N. E. 188 (190).

"The instruction considered as a whole correctly states the law. Upon the evidence of appellant, plaintiff was guilty only of a misdemeanor. In Doering v. State, 49 Ind. 60, 19 Am. Rep. 669, it is said that the law applicable to arrests by private citizens is stated with great precision and clearness by Tilghman, C. J., in Wakely v. Hart, 6 Bin. 316, where, after quoting a provision of the state constitution and commenting thereon, it is said: 'But it is nowhere said that there shall be no arrest without warrant. To have said so would have endangered the safety of society. The felon who is seen to commit murder or robbery must be arrested on the spot or suffered to escape. So, although not seen, yet if known to have committed a felony and pursued with or without a warrant, he may be arrested by any person. And even where there is only probable cause of suspicion, a private person may, without warrant, at his peril, make an arrest. I say at his peril, for nothing short of proving the felony will justify the arrest. These are principles of common law essential to the welfare of society, and not intended to be altered or impaired by the constitution.' "

CHAPTER LX.

MALPRACTICE.

See Erroneous Instructions, same chapter head, Vol. III.

§ 1289. Warranty of Skill, Knowledge and Care Implied. The court instructs the jury, that if a person holds himself out to the public as a physician and surgeon, he must be held to possess and exercise ordinary skill, knowledge and care in his profession in every case of which he assumes the charge, whether in the particular case he receives fees or not.[1]

§ 1290. Degree of Care Required—Ordinary—Not the Highest Skill and Care. (a) Where an injury results from a want of ordinary skill, or from a failure to exercise ordinary skill or attention in the treatment of a case, the physician or surgeon is held responsible for such injury.[2]

(b) The highest degree of care and skill is not required of a physician to relieve him from liability for damages resulting from his treatment of a patient—only reasonable care and skill are required.[3]

1—McNevins v. Lowe, 40 Ill. 209; Cooley on Torts (3d Ed.), 1391; 1 Hill. on Torts, 224; McCandless v. McWha, 22 Penn. 261; Simonds v. Henry, 39 Me. 155; Geiselman v. Scott, 25 Ohio St. 86; Peck v. Hutchinson, 88 Ia. 320, 55 N. W. 511.

2—Barnes v. Means, 82 Ill. 379; McKenzie v. Carman, 103 App. Div. 246, 92 N. Y. S. 1063.

3—Holtzman v. Hoy, 118 Ill. 534,

(c) The care and skill required of the defendant is not the highest degree of knowledge and skill known to the profession, but such as is possessed by men of his profession in the neighborhood.[4]

(d) While persons, who hold themselves out to the public as physicians and surgeons, are not required to possess the highest degree of knowledge and skill which the most learned in their profession may have acquired, yet they are bound to possess and exercise, in their practice, at least the average degree of knowledge and skill possessed and exercised by the members of their profession generally in the locality in which they practice.[5]

(e) Every person who offers his services to the public generally, in any profession or business, impliedly contracts with those who employ him, that he is a person of the skill and experience which is possessed, ordinarily, by those who practice, or profess to understand the same art or business, and which is generally regarded by those most conversant with that profession or employment, as necessary to qualify him to engage in such business successfully.[6]

(f) If the jury believe, from the evidence, that the defendant held himself out to the public as a physician and surgeon, and that he was employed to treat, as a surgeon, an injury sustained by the plaintiff, as charged in the declaration, and that he undertook such employment, and that he did not treat the said injury with ordinary skill and knowledge, and that the plaintiff sustained any injury or damage by reason thereof, then the jury should find for the plaintiff.[7]

§ 1291. Care and Skill Required by Dentist—Patient Must Conform to Advice and Co-operate with Doctor. (a) The defendant is responsible to the plaintiff only for ordinary care and skill and the exercise of his best judgment; not for the want of the highest degree of skill. It was the duty of the plaintiff to co-operate with the defendant, and to conform to his advice; and, if he advised her to return upon the tooth's giving her trouble, and she did not return, either from want of inclination, because her father was busy, or on account of sickness, it was her own neglect, provided, the defendant used ordinary skill and his best judgment.

(b) That if the defendant did not, at the time of treating the plaintiff, possess the learning and skill ordinarily possessed by members of the dental profession, and by improper treatment the plaintiff was injured, the defendant would be liable for such damages as the plaintiff sustained by reason thereof, and the jury should answer the first issue, "Yes."[8]

8 N. E. 832; Wood v. Wyeth, 106 App. Div. 21, 94 N. Y. S. 360.

4—McCracken v. Smathers, 122 N. C. 799, 29 S. E. 354 (355).

5—Gates v. Fleischer, 67 Wis. 504, 30 N. W. 674; Gramm v. Boener, 56 Ind. 497. See Smother v. Hanks, 34 Ia. 286; Almon v. Nugent, 34 Ia. 300.

6—Holtzman v. Hoy, supra.

7—Hallam v. Means, 82 Ill. 379; Shockley v. Tucker, 127 Ia. 456, 103 N. W. 360.

8—McCracken v. Smathers, 122 N. C. 799, 29 S. E. 354 (355).

§ 1292. **Degree of Learning and Skill Ordinarily Possessed Means Such Learning and Skill Contemporaneous with the Transaction—Advanced State of Profession.** (a) The degree of learning and skill which the physician and surgeon holds himself out to possess is that degree which is ordinarily possessed by the profession, as it exists at the time or contemporaneous with himself, and not as it may have existed at some time in the past; and the physician and surgeon must, in general, be held to apply in his practice what is thus settled in his profession.[9]

(b) The implied contract of the defendant when he assumed charge of the treatment of plaintiff's injuries was that he possessed and would employ in the treatment of the case such reasonable skill and diligence as were ordinarily exercised in his profession at and in localities similar to that in which he practiced, by the members as a body; that is, the average of the reasonable skill and diligence ordinarily exercised by the profession at the time and in places similar to G. Regard is to be had in determining this ordinary skill and diligence to the improvement and advanced state of the profession at the time the case was treated.[10]

§ 1293. **Practitioner Possessing Learning and Skill but Failing to Exercise It.** That, if the defendant did possess the learning and skill which ordinarily characterizes his profession, and failed to exercise it in this case, and the plaintiff was injured in consequence thereof, the defendant would be liable to such damages as the plaintiff sustained.[11]

§ 1294. **Ordinary Care by Agent of Physician.** (a) The court instructs the jury that if you shall believe from the evidence that K. was the agent, servant or employe of defendants, and that, as such agent, servant or employe, said K. rendered treatment to plaintiff, then it was his duty to treat her with ordinary care and skill; and if you shall believe from the evidence that while he was treating her, as the agent, servant or employe of defendants, he violently bruised, bent, twisted or wrenched plaintiff's back or spine, and that such treatment was improper, and not such as an ordinary, careful and skillful man would have given the plaintiff under the circumstances, you will find that defendants' treatment of the plaintiff by said K., as their agent, servant and employe, was careless, negligent and unskillful.

(b) The court instructs the jury that if you shall believe from the evidence that K., as the agent, servant and employe of the defendants, did carelessly, negligently and unskillfully treat plaintiff, as defined in the previous instructions, and that by such treatment

9—McCracken v. Smathers, supra.

10—Decatur v. Simpson, 115 Ia. 348, 88 N. W. 839 (840). "That it announced the correct rule is conceded."

11—McCracken v. Smathers, 122 N. C. 799, 29 S. E. 354 (355).

he did hurt, bruise and injure plaintiff in and upon her back, spine or pelvic organs, your verdict must be for the plaintiff.[12]

§ 1295. **Different Schools of Medicine—Rule by Which Physician Is to Be Judged.** If there are distinct and different schools of practice, and a physician of one of those schools is called in, his treatment is to be tested by the general doctrines of his school and not by those of other schools. It is to be presumed that the parties so understood it. The jury are not to judge by determining which school, in their own view, is best.[13]

§ 1296. **Specialist—Degree of Skill and Care Required.** A physician or surgeon making a specialty of the practice of surgery is not bound to use any greater skill, care, or diligence in the treatment of the case than a specialist in like or similar localities in which said physician or surgeon resides and practices his profession.[14]

§ 1297. **Action for Damages for Shortening of Leg in Consequence of Fracture.** Although the jury may believe, from the evidence, that the plaintiff's leg became shortened in consequence of the fracture, or during the course of treatment subsequent to the fracture, still the defendant is not liable in damages therefor, unless the shortening was due to the want of reasonable and ordinary care and skill on his part; and if the jury further believe, from the evidence, that the extension of the limb could not well and safely be effected, nor the means and appliances for that purpose be safely used, before the time for bony union to commence, and that bony union, under proper treatment, would not, and did not commence before the defendant was discharged, and the plaintiff placed under the charge of another surgeon, then the defendant would not be liable in damages resulting from the shortening of the limb.[15]

§ 1298. **Patient Can Only Recover for Additional Pain.** (a) In a suit against a surgeon for malpractice in treating an injury, the plaintiff is not entitled to recover anything on account of the pain and suffering caused by the injury, but only for such additional pain, suffering and injury as is produced by the negligence or want of skill of the defendant in the treatment.[16]

(b) And if, from the evidence in the case, the jury further believe, that the plaintiff did not receive from the defendant such

12—Longan v. Weltmer, 180 Mo. 322, 79 S. W. 655 (656), 64 L. R. A. 969.

13—Force v. Gregory, 63 Conn. 167, 27 Atl. 1116, 22 L. R. A. 343, 38 Am. St. Rep. 371; Martin v. Courtney, 75 Minn. 255, 77 N. W. 813.

14—Beadle v. Paine, 46 Ore. 424, 80 Pac. 903 (905).

The criticism was that the skill, care, and diligence required of defendants, were such as are observed in like or similar localities. "The qualification might have been made with propriety. But the court had in previous instructions so explicitly informed the jury that the degree of skill required would be such as was possessed by the average members of the profession practicing as specialists in similar localities, regard being had to the advanced state of medical science at the time, that they could hardly have been misled by this instruction."

15—Kendall v. Brown, 74 Ill. 232.

16—Wenger v. Calder, 78 Ill. 275.

care, attention and skill, and that in consequence thereof, and without fault on his part, the plaintiff suffered increased pain, and suffered the injury complained of in the declaration, then the defendant is liable in this suit, and the jury should render a verdict for the plaintiff.[17]

§ 1299. Patient Bound to Follow Instructions—Should Co-operate with—Failure to Obey. (a) The court instructs the jury, that where a person employs a physician or surgeon to treat a disease or an injury the patient is bound to adopt and follow out all reasonable directions and requirements of the physician, relating to the treatment or care of the disease or injury; and if he does not do so, and injurious consequences, affecting the disease or injury, result from his failure so to do, he cannot recover of the physician or surgeon, alleging a want of skillfulness on the part of the physician or surgeon.[18]

(b) The jury are further instructed, that it is the duty of a patient to co-operate with his physician or surgeon, and to conform to all reasonably necessary prescriptions and directions, regarding the care or treatment of the disease or injury; and if he will not, or if, under the pressure of pain, he cannot, then he cannot hold his surgeon responsible for any injurious consequences arising from his failure to obey such prescriptions or instructions, if any such is shown by the evidence.[19]

(c) If the jury find, from the evidence, that the defendant directed the plaintiff to observe absolute rest as a part of the treatment of the injury in question, and that that direction was such as a surgeon or physician of ordinary skill would adopt or sanction, and further, that the plaintiff negligently failed to observe such direction, or purposely disregarded the same, and that such neglect or disobedience directly contributed to the injuries of which the plaintiff complains, then he cannot recover in this action, although the jury may believe, from the evidence, that the defendant's negligence or want of skill also contributed to such injuries.[20]

§ 1300. Physician Is the Proper Judge of the Necessary Frequency of Visits. The jury are instructed, as a matter of law, that the physician attending a patient is the proper and sole judge of the necessary frequency of the visits to his patient so long as the patient is in his charge, and in an action for his services the physician is not required, under the law, to prove the necessity of his making the number of visits that he makes, and for which he is seeking compensation.[21]

17—Kendall v. Brown, 86 Ill. 387.

18—Gramm v. Boener, 56 Ind. 497; Geiselman v. Scott, 25 Ohio St. 86; Beadle v. Paine, 46 Ore. 424, 80 Pac. 903.

19—Cooley on Torts (3d Ed.) 1394; 1 Hill. on Torts 225; Lanson v. Conaway, 37 W. Va. 159, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627.

20—Geiselman v. Scott, supra.

21—Ebner v. Mackey, 186 Ill. 297

§ 1301. **Burden of Proof on Plaintiff.** (a) The jury must remember that the burden of proof is on the plaintiff to maintain all the material facts necessary to make out his case by a preponderance of the evidence. The presumptions of the law in absence of evidence to the contrary are that the defendant is not guilty, and unless by a preponderance of the testimony the jury are made to believe that the defendant is guilty as charged, then the verdict of the jury will be not guilty.[22]

(b) The jury are instructed that the plaintiff, in this case, is bound to prove, by a preponderance of evidence, some one or more of the charges of negligence contained in the declaration, and that these charges relate to the setting or reducing the fracture of the plaintiff's leg, and also to the subsequent treatment thereof; and unless the plaintiff has proved, by a preponderance of evidence, that the leg was not properly set in the first instance, or that the subsequent treatment of the leg by the defendant was unskillful and improper, to such an extent as to show want of ordinary skill, care, or attention to said leg, then it will be the duty of the jury to render a verdict for the defendant.[23]

§ 1302. **Dentist—Due Care and Skill Required—Series.** (a) If you find from the evidence that defendant advised plaintiff not to consult a surgeon or secure medical treatment after her jaw was injured by defendant, if you find the same was carelessly and negligently injured by defendant, and that plaintiff relied thereon, and did not consult a physician or surgeon for a number of weeks after such injury, and that by reason of such delay, plaintiff's injuries were aggravated and made worse, and that it was more difficult and impossible to treat or cure such injuries of plaintiff, and that thereby such injuries became, and are permanent and cannot be cured, and the same has affected the general health of plaintiff, and she has become and is sick and disordered and unable to work or perform labor or support herself by her own labor and work as she did prior to such injuries, if you find that she did so work and support herself before she was injured by defendant—then I instruct you that you

(299), aff'g 87 Ill. App. 306, 57 N. E 834, 78 Am. St. Rep. 280, 51 L. R. A. 298.

"Upon this subject, Wood on Master and Servant (sec. 177) says: 'A physician is to be deemed the proper judge of the necessity of frequent visits to his patient, and the court will presume that all the professional visits made by him were necessary. Hence, in an action for his services, he is not called upon to prove the necessity of making the number of visits he did. The physician being responsible for the want of care and faithful attention to his patient, a contrary rule would work great hardship to him and subject him to undue perils.' To the same effect is Todd v. Myers, 40 Cal. 357; C. B. & Q. R. R. Co. v. George, 19 Ill. 510, 71 Am. Dec. 239, does not, as supposed, announce a contrary doctrine. Under the circumstances, of this case, the instruction was proper."

22—Chase v. Nelson, 39 Ill. App. 53 (59 & 60).

23—Kendall v. Brown, 86 Ill. 387; Holtzman v. Hoy, 118 Ill. 534, 8 N. E. 832.

may take all such matters into consideration in fixing the damage incurred by plaintiff by such acts.

(b) Should the evidence fail to show that defendant did not exercise ordinary skill, care and prudence in the work which he did for plaintiff, then you must find a verdict for the defendant. You should also bear in mind that the contention of plaintiff that there was a lack of care or skill on the part of defendant is a fact which the law requires the plaintiff to prove by a preponderance of the evidence, the same as any other fact or facts in the case, and the jury would not be satisfied in finding this as a fact upon mere surmises or assumptions.

(c) If the plaintiff sought the services, care and skill of the defendant for dental work, and the defendant accepted her employment to do such work, the law only required of him the possession of such skill and learning in his profession, and only required of him in the performance of his work such ordinary care and skill as is ordinarily possessed by a person following such profession, and if you find from the evidence in this case that the defendant at the time he performed services for the plaintiff did possess skill and learning, and that in his services rendered to the plaintiff, in all the work performed for her by him he exercised that skill and care and good judgment, then you must find a verdict for the defendant, even if you should also find from the evidence that the plaintiff suffered injuries and pain after such services were performed for her, even if caused by the work of the defendant.[24]

§ 1303. No Warranty of Cure—Implied Contract of Ordinary Skill —Measure of Damages—Burden of Proof—Contributory Negligence—Series. (a) The court instructs the jury that one who holds himself out to the public as a physician and surgeon, the law implies a promise and duty on his part that he will use reasonable skill and diligence in the treatment and for the care of those who may employ him. Therefore, if you believe from the evidence that plaintiff employed defendant to set and heal the dislocation of plaintiff's shoulder, and that defendant negligently, carelessly and unskillfully treated and managed said dislocation, and that said dislocation was not set, placed or reduced, and through such negligence plaintiff's shoulder has become permanently injured, lamed and disfigured, then you will find for the plaintiff in a sum not to exceed ———— dollars.

(b) The court instructs the jury that the only question in this case for your determination is whether the defendant, when called to see plaintiff on the ——— day of ————, properly reduced and treated the dislocated shoulder of plaintiff, and gave her proper and necessary directions and instructions for the care of same. If he did, then he cannot be held liable for any injury resulting from

24—Mernin v. Cory, 145 Cal. 573, 79 Pac. 174 (175).

any redislocation of said shoulder that may have afterwards occurred. On the other hand, if, when called to see plaintiff on said date, he failed to reduce and properly treat said dislocated shoulder and give proper and necessary directions for the care of same, or failed to exercise such care and skill as is used by the average members of his profession under like conditions and circumstances in attempting to so reduce and treat said dislocation, then you should find the issues for plaintiff, according to the rule given in instruction No. 1.

(c) The court instructs the jury that the terms "careless" and "negligent," as used in these instructions, do not imply lack of skill or capacity but simply a disregard of ordinary prudence, and, although you may believe the defendant, ————, to have possessed all the qualifications necessary to a competent and skillful physician and surgeon, yet if it has been proven that he was careless and negligent in reducing the dislocation of plaintiff's shoulder, and that through such carelessness and negligence plaintiff's shoulder has been permanently injured, lamed and disfigured, then the mere fact that the defendant may have been competent and skillful constitutes no defense to this action.

(d) The court instructs the jury that in determining this case they are to consider that the defendant did not warrant a cure, but his contract, as implied in law, was that he possessed that reasonable degree of learning, skill and experience which is ordinarily possessed by others of his profession; that he would use reasonable and ordinary care and diligence in the treatment of the case; and that he would use his best judgment, in all matters of doubt as to the proper course of treatment. The defendant is not responsible in damages for want of success, unless it is shown from the evidence to result from the want of ordinary skill and learning, and such as is ordinarily possessed by others of his profession, acting under like circumstances, and from want of ordinary care and attention. The employment of the defendant by plaintiff was not for extraordinary diligence and care, and defendant cannot be made responsible in damages for errors in judgment, or mere mistakes in matters of doubt or uncertainty, provided he exercised and used in the treatment of the plaintiff such reasonable skill and diligence as is ordinarily exercised and used in the practice of the profession of defendant by those who practice under like conditions.

(e) The court instructs the jury that the services of the wife belong wholly to her husband, and if you believe from the evidence that plaintiff is a married woman, having a living husband, then, in estimating her damages, if any you find she has sustained, you will not take into consideration her loss of time or service as a result of her injury, if any.

(f) The court instructs the jury that the burden of proving that the defendant was careless and negligent in his treatment of the plaintiff is placed upon her, and, before she can recover herein, she

must establish such facts by a preponderance of testimony, and in the absence of such preponderance, they will find the issues for the defendant.

(g) The burden is upon the defendant to prove to the reasonable satisfaction of the jury, by the preponderance of the evidence, the defense of contributory negligence set up and pleaded in his answer; and, if he has failed to so prove and satisfy the jury, the finding must be for the plaintiff on the issue of contributory negligence.

(h) If the shoulder joint of the plaintiff slipped out of place (that is, was redislocated) after being properly set and treated by defendant when called upon to treat her for dislocation of the shoulder as charged, and the patient dismissed, then the plaintiff cannot recover herein, and the verdict must be for defendant.

(i) The court instructs the jury that proof of negligence need not be by direct testimony, but may be inferred by the jury from all the facts and circumstances in evidence in the case.

(j) The court instructs the jury that it is admitted by the pleadings that defendant, ————, is a physician and surgeon, that plaintiff's shoulder was dislocated, and that plaintiff employed defendant to set and heal the said dislocation.[25]

25—Wheeler v. Bowles, 163 Mo. 398, 63 S. W. 675 (677).

Note.—See chapter 32 on Attorneys for want of skill of attorneys of law.

CHAPTER LXI.

MORTGAGES AND LIENS.

See Erroneous Instructions, same chapter head, Vol. III.

MORTGAGES.

§ 1304. Mortgage Securing Two Debts, One Valid, the Other Illegal. If one gives a good and valid consideration, and thereupon another promises to do two things, one legal and the other illegal, he shall

be held to do that which is legal, unless the two are so mingled and bound together that they cannot be separated, in which case the whole promise is void; and this is so whether the law which is violated be statute or common law.[1]

§ 1305. Person Having Interest in Goods Covered by Chattel Mortgage, Who Stands by and Allows Property to be Sold, Estopped. (a) If, from the evidence, you find that the plaintiff had knowledge that the defendant was about to sell the mortgaged property, and that he was present at the time of sale, and stood by, and saw the same sold, and possession taken thereunder, and made no objections thereto, then he is estopped from claiming damages by reason of said sale, and cannot recover by reason of the alleged wrongful conversion of the mortgaged property so sold.[2]

(b) The court instructs the jury that although you find from the evidence that E. received from M. & Co. an account against H. & Co. for collection, and that he placed his mortgage on record immediately after receiving said account, and that he did not notify M. & Co. that he had a mortgage on said stock of goods, these facts are not sufficient to constitute a defense of estoppel herein, if you further find from the evidence that the note and chattel mortgage read in evidence was given by said H. & Co. to said E. (in good faith) for a valid debt.[3]

§ 1306. Property Bought Would be Measure of Credit, if Sale is Fair. If the property was sold openly, and notice was published, and it was a fair sale, and fairly done, then the amount of money that the property brought would be the measure of credit. The defendant would be entitled to a credit only for the amount that the property sold for if the sale was had fairly and honestly, openly, and after due notice was given.[4]

1—Smith v. Smith, 87 Ia. 93, 50 N. W. 64 (66), citing Casady v. Woodbury Co., 13 Iowa 117.

2—Richardson v. Coffman, 87 Ia. 121, 54 N. W. 356 (358).

"In support of the above proposition, we are cited to authorities which hold that one 'who negligently or culpably stands by, and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving.' Gregg v. Wells, 10 Adol. & E. 90; Miles v. Lefi, 60 Iowa 168, 14 N. W. 233. In the above case, however, the court held that this rule did not apply owing to the fact that the mortgagee became the purchaser at the sale; that it was only where innocent parties purchased the property that such estoppel would avail."

3—State ex rel. Kennen v. Fidelity & Deposit Co., 94 Mo. App. 184, 67 S. W. 958 (962), 4 Am. St. Rep. 368.

"The use of the phrase 'in good faith' was mere surplusage, and did not in the least prejudice appellants or invalidate the instruction."

4—Morris v. Hubbard, 14 S. D. 525, 86 N. W. 25 (28).

"The only evidence offered touching the disposition of the property retained by the mortgagee was given by the plaintiff, the substance of which has been stated. In the absence of any evidence to the contrary, it should be presumed that the plaintiff acted lawfully. Therefore the mortgagors were only entitled to credit for

§ 1307. Penalty for Failure to Cancel Mortgage on Records. (a) If the jury believe from the evidence that the plaintiff had fully paid the mortgages and had served written notice upon the defendant to mark the records "Satisfied" and that the defendant failed for more than two months to satisfy the records after having received said notice, it is not necessary for the plaintiff to prove that he sustained any damages on account of such failure.

(b) This suit is brought for the recovery of a penalty on account of the failure of the defendant to mark the records "Canceled" or "Satisfied." The gist of the action is the failure on the part of the defendant to satisfy the records after notice in writing to satisfy, and the plaintiff does not have to prove that he has sustained any damages.[5]

§ 1308. Application of Payment—Mortgage Debt—Unsecured Debt. In this case, gentlemen, you are charged that when a debtor owes a secured and unsecured debt to a creditor, and payments are made by the debtor without any agreement as to how the application of the payments should be made, the proceeds of the mortgaged property should be applied to the mortgage debt in preference to the unsecured debt.[6]

§ 1309. Agreement and Mortgage Constituting an Assignment—Power of Attorney. (a) The defendant in this case interposes two defenses: First, that the mortgage which has been introduced in evidence, and under which the plaintiff claims, together with the agreement signed and executed about the same time as the execution of the mortgage, constituted an assignment, and under the law, the same was void, for the reason that affidavit and bond had not been made, as the law regulating assignments makes necessary.

(b) That if under the mortgage and agreement first executed at or about the same time as the mortgage, and which have been introduced in evidence, the property was taken possession of by the plaintiff, and handled or disposed of or managed, then the court instructs you that such agreement and mortgage together constitute an assignment, and that the mortgage would be, therefore, void. But it is contended by the plaintiff that, subsequent to the execution of the mortgage and the first agreement, that a power of attorney was executed to the plaintiff by H, and that that power of attorney took the place of and was substituted for the agreement which was executed at or about the time of the execution of the mortgage. If you are satisfied from the evidence that this power of attorney was executed and took the place of the agreement executed at the same time as the mortgage, and that the property was taken possession of

the amount for which the property was sold, and the charge of the court was more favorable to the defendant than it should have been."

5—Hoffman v. Knight, 127 Ala. 149, 28 So. 593 (594).

6—Howard et al. v. Schwartz et al., 22 Tex. Civ. App. 400, 55 S. W. 348 (349).

and managed under the power of attorney, and not under the agreement, and that the agreement was not in force, that then and in that event, the court instructs you that the mortgage and power of attorney did not constitute an assignment, and that the mortgage was therefore not void, but in full force and effect. Hence the question of the invalidity of the mortgage or its validity is a question for your determination from all the evidence in the case, depending, as I have said, upon the question whether the agreement was in force with the mortgage, or the power of attorney subsequently executed was in force with the mortgage, and took the place of agreement. If the agreement and mortgage were in force, then the mortgage was void, and in that event upon this issue you should find for the defendants; but, if the power of attorney and mortgage were in force, then the mortgage was good, and upon that issue you should find for the plaintiff.[7]

§ 1310. Chattel Mortgage as Against Judgment Creditors—Mortgage Good Between the Parties Without Recording. The court instructs the jury, that the chattel mortgage, introduced in evidence in this case, if made and received in good faith on the part of the mortgagee, is sufficient to invest him with the right to take the property therein described and to retain it for the purpose of selling it, as provided in the mortgage, even though it has not been recorded as required by law.[8]

§ 1311. As to Creditors, Must be Acknowledged and Recorded. (a) If the chattel mortgage is not acknowledged before a justice of the peace of the town where the mortgagor resides, and an entry of it made on his docket, or if it is not filed for record in the office of the recorder of deeds, then, as to the creditors of the mortgagor, it will be invalid, and they may levy an execution on the property, as though no mortgage had been made.[9]

(b) The court instructs you that unless one is charged with record or constructive notice of said mortgage his purchase would be superior to and free from lien of plaintiff's mortgage. Constructive or record notice is such notice as is presumed to be imparted by

7—Hargadine-McKitrick D. G. Co. v. Bradley, 4 Ind. T. 242, 69 S. W. 862 (865).

"Taking the court's entire charge and comparing it with the directions and holding of the circuit court of appeals of the Eighth circuit, we are satisfied that it fully, fairly, and cogently announces the law of the case in accordance with said decision. The charge was not misleading in any way. It fairly told the jury that it was in their province to say whether or not the agreement made at or about the same time as the mortgage was laid aside between the parties, and the power of attorney substituted in its place, and that, if they found one way or other, the law with reference to their finding made the mortgage void or valid, as they should find. And the circuit court of appeals say that this was the question in the case to be submitted and referable to a jury."

8—Fuller v. Paige, 26 Ill. 358, 79 Am. Dec. 379.

9—Porter v. Dement, 35 Ill. 478.

recording in the proper county a properly drawn and properly acknowledged instrument.[10]

(c) The jury are further instructed, that a chattel mortgage not acknowledged or recorded, though obligatory and binding between the parties to it, is void as to creditors and purchasers in good faith.[11]

§ 1312. To Constitute Notice, Description in Mortgage Must be Sufficient. (a) To be properly drawn it must contain a sufficient description of the property intended to be mortgaged. If the description of the property be not sufficient, the recording of the mortgage will not constitute notice. The description contained in the mortgage in question, on the face thereof, appears to be sufficient in law. It is for you to determine whether it is sufficient in fact, from the evidence in the case.

(b) The defendant claims that the description contained in the mortgage is not sufficient in fact. To be sufficient in fact, the description must be such that a third person may take said mortgage, and from the facts therein stated, and inquiries therein suggested, and such only, can identify the property covered by said mortgage with certainty. A description is sufficient which enables a third party, aided by the inquiries which the instrument itself suggests, to identify the property covered by it. If it directs the mind of the inquirer to facts or evidence from which he may ascertain the mortgaged property with certainty, it is sufficient. When a mortgage contains a description, part of which is true and part false and erroneous, that which is false or erroneous may be stricken out as redundant or superfluous, and the description will be sufficient if enough remains to lead a third party, by the inquiries it suggests, to the identification of the property covered by it. You are to take the mortgage in question, and, under the rules above announced, ascertain whether the property described in it, under the evidence before you, can thus be identified. If it can thus be identified the description is sufficient, and the recording of the chattel mortgage in question constituted constructive notice to the defendant of the existence of said mortgage, and his purchase of the cattle in controversy was subject to the lien thereof.

(c) If you find that the description in said mortgage is sufficient under the rules set forth, you will find for the plaintiffs as to such property in controversy as you find covered by said mortgage, unless you should further find the plaintiffs have waived the lien of their mortgage as above indicated. If you find that the property described in the mortgage can not be identified with certainty under the rules above given, and you find that the description is insufficient, then the recording of the mortgage in question would not constitute notice

10—Livingston v. Stevens, 122 Ia. 62, 94 N. W. 925 (927-8). Grimmer v. Nolen, — Ala. —, 40 So. 97.

11—Forest v. Tinkham, 29 Ill. 141;

to defendant of the existence of said mortgage, and his purchase of the cattle in controversy was free from and superior to the claims of the plaintiffs under their mortgage, and you will find for the defendant.[12]

§ 1313. **Fraudulent Purpose—Notice of Such Facts as Would Lead a Man of Ordinary Prudence to a Knowledge.** The jury are instructed that the mortgage introduced by the plaintiff in evidence is not fraudulent on its face; and, in order for you to find for the defendant, you must believe that there was a fraudulent purpose in the making and receiving of the same, which was shared by both the plaintiff in this action and R, who made the same. Or that R had such fraudulent purpose, and plaintiff had notice of such facts as would lead a man of ordinary prudence to a knowledge of such fraudulent purpose on the part of said R; and you are also instructed that such a belief must be formed from believing that a preponderance of the testimony goes to establish such facts.[13]

§ 1314. **Intent to Defraud Must Exist at Time of, Etc.** To render a chattel mortgage fraudulent, the intent to defraud must exist when the mortgage is made. The mortgagor's subsequent conduct in dealing with the property, while it may be considered by the jury in determining whether there was fraud in the making of the mortgage, will not itself render the mortgage void.[14]

§ 1315. **Priority Between Lien of Judgment and Chattel Mortgage—Mortgagor Retaining Possession.** (a) If the jury believe, from the evidence, that the plaintiff's only claim to the property in question was derived from the mortgage in evidence and that the property was allowed to remain in the possession of the mortgagor, after the expiration of the time for the payment of the debt secured by said mortgage, and after a reasonable time for the mortgagee to take possession of the property, and that while it was so in the possession of the mortgagor, the execution introduced in evidence was placed in the hands of the officer (or was levied on the property), then the law is, that the property was liable to such execution.[15]

(b) You are instructed that a chattel mortgage, although filed

12—Livingston v. Stevens, 122 Ia. 62, 94 N. W. 925 (927-8).

13—Kay v. Noll, 20 Neb. 380, 30 N. W. 269 (272).

The court approved the above instruction, but held that in the case at bar there was no evidence to sustain it, saying:

"The foregoing instructions, as given, no doubt contain a very fair exposition of the law applicable to a case where there was evidence of a fraudulent intent on the part of the mortgagor, and of the existence of facts, at the time of the execution of the mortgage, indicating such fraudulent intent, which, if inquired into, would have led to a knowledge thereof. But in the case at bar there is no evidence of a fraudulent intent on the part of the mortgagor at the time of the execution or delivery of the mortgage, nor the slightest evidence of any fact, known or unknown to the mortgagee, indicating, or tending to indicate, the existence of a fraudulent intent on the part of R., the mortgagor."

14—Horton v. Williams, 21 Minn. 187.

15—Whisler v. Roberts, 19 Ill. 274; Richley v. Childs, 114 Ill. App. 173.

for record, is *prima facie* fraudulent as to creditors and *bona fide* purchasers if the mortgagor retains possession of the mortgaged property; and the person claiming under such mortgage must make it appear that the same was made in good faith, in order to recover.

(c) You are instructed that it is not only the honesty of the debt secured, but the purpose of the conveyance, to which the statute has referred. An honest debt is an important part of the transaction, but if the mortgage was given by the mortgagor and taken by the mortgagee with intent to hinder and delay creditors, then it is void, though an honest debt be secured by the instrument.[16]

§ 1316. Possession by the Mortgagor After Default. The jury are instructed, as a matter of law, that when mortgaged chattels have been reduced to possession, after default, and the title has become absolute in the mortgagee, he may then loan the property to the mortgagor, precisely as he might any of his other property, and such repossession by the mortgagor would not render the mortgage, or the mortgagee's title under it, fraudulent or void as to creditors.[17]

§ 1317. Possession by the Mortgagee—Must Take Possession of the Property, When. (a) If you believe, from the evidence, that the mortgage introduced in evidence in this case, was made in good faith, and given for a good and valuable consideration, and that the mortgagee had taken the property, and was in possession of it under the mortgage when the attachment writ (or execution) was issued and levied, then the mortgagor had but a right of redemption in the property, and this right would not be subject to be taken by the creditors of the mortgagor, unless they first paid to the mortgagee the amount of his claim against the property.[18]

(b) The court instructs the jury, that the law requires a person having a chattel mortgage on property, in order to hold the property as against innocent purchasers and creditors, to take possession of the property, under the mortgage, as soon as it can reasonably be done, after the debt which it is made to secure becomes due. If there is any unnecessary delay in taking such possession of the property, then the property will be liable to be levied upon, or sold as the property of the mortgagor.[19]

§ 1318. Taking Possession Before Debt Due. The jury are instructed that under the mortgage introduced in evidence it was competent for the defendant to take possession of and sell the mortgage property at any time when he should deem himself insecure, notwithstanding the debt had not matured or become due and payable, and if the jury believe, from the evidence, that the property in question was embraced in the mortgage, and that the defendant,

16—Marcus v. Leake, 4 Neb. (unof.) 354, 94 N. W. 100.
17—Funk v. Staats, 24 Ill. 632.
18—Nash v. Norment, 5 Mo. App. 545.
19—Barbour v. White, 37 Ill. 164.

when he took the property in good faith, deemed himself insecure, then he had a right to take the property, when he did take it and on that point the jury should find for the defendant.[20]

§ 1319. **Sale by Mortgagor—With the Consent of the Mortgagee—For Benefit of Mortgagee.** (a) If the jury believe from the evidence, that the chattel mortgage introduced in evidence was made in good faith and to secure a *bona fide* indebtedness, then, even though the jury should further believe, from the evidence, that the mortgagor, from time to time, sold off certain portions of the property, with the knowledge and consent of the mortgagee, these facts alone would not render the mortgage void as to the balance of the property.[21]

(b) Although the jury may believe from the evidence that after the said mortgage was given the mortgagor was permitted by the plaintiff to sell and dispose of portions of the property covered by the mortgage, still this would not render the mortgage void as to the creditors of the mortgagor, provided the jury further believe, from the evidence, that the said A. B. was actually indebted to the plaintiff—that the mortgage was made in good faith to secure such indebtedness and that the permission by the plaintiff to sell such property was given in writing and only upon condition that the avails of such sales should be turned over to the plaintiff to be used in discharge of the indebtedness secured by the mortgage.[22]

(c) If you find from the evidence, by the greater weight thereof, that the plaintiffs, at the time of the sale of the cattle in question to T, and of the execution of the mortgage in suit, knew that it was the purpose and intent of T. to ship said cattle out to Iowa and sell the same, for the purpose of procuring money with which to pay the purchase price thereof, and with such knowledge made such sale to him, and took such mortgage from him in contemplation of the sale of said cattle by said T, then you may inf that the plaintiff's consent to such sale, and by such acts waived the lien of the mortgage; or, if you find from the evidence by the greater weight thereof that the plaintiffs at the time of the sale of said cattle and the execution of said mortgage orally consented to the sale of said cattle by T., you will find that they waived the lien of their said mortgage.[23]

§ 1320. **Mortgage to Secure Contingent Liability.** Although the jury may believe from the evidence that the said A. B. was not indebted to the plaintiff at the time he made the mortgage in question, still if the jury further believe from the evidence that at that time the plaintiff was security for the said A. B. as (a guarantor) on

20—Evans v. Graham, 50 Wis. 450, 7 N. W. 380.

21—Jaffray v. Greenbaum, 64 Ia. 492, 20 N. W. 775, 52 Am. Rep. 449.

22—Goodheart v. Johnson, 88 Ill. 58.

23—Livingston v. Stevens, 122 Ia. 62, 94 N. W. 925 (927).

certain notes, etc., and that the said chattel mortgage was in good faith given to secure the said plaintiff against his contingent liability as such guarantor, then the said mortgage would be a good and valid security in favor of said plaintiff.[24]

§ 1321. Giving Mortgage for More Than is Due—Good Faith—Future Advances. (a) You have heard the explanation of the parties; and, if you believe (from the evidence) that the plaintiffs' theory is true; that the mortgage was given in good faith, to secure a present indebtedness, and to secure this further indebtedness, if there is any, become due thirty days before this suit was commenced, —then the plaintiffs are entitled to recover at your hands; otherwise, not. There has been something said to the effect that this mortgage was fraudulent. Now, gentlemen, while it is a badge of fraud to give a mortgage for more than is due, a mortgage is not fraudulent for including future advances.

(b) If you find (from the evidence) that the mortgage was given in good faith, to secure an honest indebtedness at the time,—it would secure it as between all the parties to this contention, and it would also secure them in subsequent indorsements, bills, notes and advances made by them for the benefit of ———— coming within the contemplation of the paper; and if, thirty days before this suit was commenced, they had made notes, bills and advances and they were due and payable and not paid thirty days before the suit was commenced in this cause, the plaintiffs are entitled to recover.[25]

(c) You are instructed that although the taking of the mortgage by the mortgagee for a greater amount than was actually due may be regarded as one of the badges of fraud, yet this fact alone does not render the mortgage fraudulent or void, if no fraud was really intended.[26]

(d) The court instructs the jury, that a chattel mortgage, made in good faith, to secure an existing indebtedness, and also further advances, may be a good and valid mortgage. It is not essential to the validity of such a mortgage that it should show, on its face, that it was made in part to secure such future advances.[27]

(e) Although the jury may believe, from the evidence, that there was a good consideration for the said note, to the extent of $125, still, if the jury further believe, from the evidence, that there was no consideration for more than that amount and that the said note and chattel mortgage were given for a greater amount than was due, for the purpose of defrauding, hindering and delaying creditors of the said mortgagor, then the said note and mortgage are wholly

24—Goodheart v. Johnson, 88 Ill. 58.

25—Hyde v. Shank, 77 Mich. 517, 43 N. W. 890 (892).

26—Pike v. Colvin, 67 Ill. 227.

27—Bump on Fraud. Conv. 229; Speer v. Skinner, 35 Ill. 282; Miller v. Lockwood, 32 N. Y. 293; Shirras v. Craig, 7 Cranch 34; Tulley v. Harlow, 35 Cal. 302, 95 Am. Dec. 102; Brown v. Kiefer, 71 N. Y. 610.

void, and confer no right whatever upon the said, etc., ——— not even for the $125.[28]

§ 1322. **Mortgage of Stock of Goods—Sale in the Usual Course of Trade.** The court instructs the jury, that a chattel mortgage of a stock of goods, used in the way of retail trade, and where the mortgagor is allowed to continue in the possession of the property, and to sell the goods in the usual course of trade, is, in law, fraudulent and void, as against the creditors of the mortgagor, no matter whether the parties intended any actual fraud or not.[29]

§ 1323. **Purpose for Which Given—Burden of Proof.** In reference to the several mortgages which have been read in evidence before you, I instruct you that either party may show by proof that the mortgage was given and received for any purpose other than what is expressed in the instrument itself, but in such case the burden is on the persons asserting that the mortgage was given for such purpose, other than the purpose therein stated, as the law presumes that the parties to the instrument expressed the contract correctly in the language they used in the instrument.[30]

LIENS.

§ 1324. **Lien of Execution by Statute.** The jury are instructed, that the execution read in evidence, was a lien upon all the personal property of A. B., the defendant therein, from the time the execution came into the hands of the officer, and that no sale or transfer of such property, by the said A. B., after that time, could destroy or affect such lien. And if the jury believe, from the evidence, that the alleged sale and delivery of the property, by A. B. to the plaintiff, was made after the execution came into the hands of the officer, such sale would be void as against the execution creditors, no matter whether made in good faith and for a valuable consideration or not, and the property could properly be taken on the execution.[31]

§ 1325. **Lien of Warehouseman—When Protected.** And, in this case, if you believe, from the evidence, that the defendants, A. and B., on or about, etc., received the property in question in the regular course of their business as warehousemen, and paid to the carrier the sum of $———, which had accrued for the carriage of the goods, and afterwards kept the goods in store, then the defendants would have a right to retain the possession of the goods until the sum ad-

28—Hoey v. Pierron, 67 Wis. 262, 30 N. W. 692.

29—Davis v. Ransom, 18 Ill. 396; Cheatham v. Hawkins, 80 N. C. 161; Peiser v. Peticolas, 50 Tex. 638, 32 Am. Rep. 621; Anderson v. Patterson, 64 Wis. 557, 25 N. W. 541; Dodge v. Norlin, 66 C. C. A. 425, 133 Fed. 363.

30—Abbott v. Stiff, — Tex. —, 81 S. W. 562 (563).

31—Childs v. Jones, 60 Ala. 352; Marsh v. Newton, 71 Ind. 22.

vanced by them, and all proper charges for storage, was paid or tendered.[32]

§ 1326. Storage Charges—Right of Bailee to Claim. If you do not believe that the plaintiff agreed to take back the pumps and credit them on the defendant's indebtedness, as defendant alleges, but believe that they were only taken back and stored as defendant's property, then you will find for the plaintiff the full amount of the account of storage and of the note, with interest and attorney's fees on the principal and interest on the note.[33]

§ 1327. Lien for Advances—Notice of Lien. The court charges the jury that if they believe from the evidence that the poles sued for were cut from lands in the possession of the defendant, by B. under an agreement that defendant was to make certain advances to B. and was to hold and keep possession of such poles till his stumpage and such advances were paid, and if they further believe from the evidence that at the time they were inspected by plaintiff's agent that they were then in the possession of the defendant, and that the said agent was notified by defendant, while he was inspecting said poles, of such arrangement, and that defendant insisted on its performance, and that such poles were not removed when inspected, but were left where inspected, then the giving by the said agent to B. of a receipt for the poles inspected by him would not be such a delivery of the poles as would take them out of the possession of the defendant; and if they further believe from the evidence that all the stumpage due defendant has not been paid or tendered, and that the advances have not been paid, then they must find for the defendant.[34]

32—Hale v. Barrett, 26 Ill. 195; Stoddard v. Crocker, 100 Me. 450, 62 Atl. 241.

33—Smith v. Heitman Co., —— Tex. ——, 98 S. W. 1074.

"The first objection to this charge is that it authorizes the jury to allow the storage charges paid by the appellee, even though appellant had not authorized appellee to store the goods, or agreed to pay for the same. If, in fact, S. had, as claimed by appellee, shipped the goods to it without notification or instruction, and without any previous agreement with regard thereto, appellee became the gratuitous bailee thereof for appellant, and in such case he had a right to store the goods, which is shown to have been necessary for their safe-keeping and protection, without further authority from appellant to do so, and appellant would be liable for necessary storage charges actually paid by appellee. If there was no agreement for the return of the goods, and that is made a condition of the finding of the jury, what was done by appellee in storing the goods was done solely in appellant's interest and for his benefit. Appellee might have refused to have anything to do with the stuff; but, having shipped it without notice or instruction of any kind, appellant cannot avoid liability for storage charges actually paid on this ground. By his positive act he constituted appellee his bailee without hire or compensation, and will not be allowed to impose upon it the additional burden of the payment of the storage charges, which in no way inured to its benefit. Schouler on Bailments, 62; Story on Bailments, par. 121; 16 Cyc. 193, and note, citing cases."

34—Austill v. Heironymus, 117 Ala. 620, 23 So. 660 (661).

§ 1328. **Lien of Farm Laborer—Statutory Limitation.** If they find that plaintiff had a lien for work done as alleged in his declaration, then any such lien expired six months from the last day on which any such work and labor were performed, and that, unless the evidence shows that this suit was commenced within such period of six months, the plaintiff cannot maintain his claim to a lien on said land.[35]

§ 1329. **Vendor's Lien—Arises, When.** An implied vendor's lien is such as arises by operation of the law in favor of the vendor of the land, as against the vendee, to secure the former in the payment of the consideration which the latter owes him for the land. Ordinarily, where one party sells land to another, and makes him a deed, an implied lien arises, independent of any agreement between the parties, to secure the vendor in the payment of any unpaid part of the purchase money, unless it appear from the evidence that it was intended between the parties that no lien should exist, or that the lien was understood between the parties to be waived.[36]

§ 1330. **What Landlord's Lien For Rent Includes—By Statute—Levy on Crops.** (a) The jury are instructed, that the statute of this state gives a landlord a lien upon the crops grown or growing upon the demised premises, in any year, for the rent that shall accrue for that year, whether the rent be payable in money, labor, or a share of the crops raised; and this lien is not confined to any particular crop, but embraces all the crops, or any portion of them, no matter upon which particular part of the premises they were raised.[37]

(b) Under our statute the landlord has a lien upon the crops grown and growing upon the demised premises, in any year, for the rent thereof for that year, and such lien continues for the period of six months after the expiration of the term for which the premises were rented, and no levy of the crops thus grown, or sale, under an execution against the tenant, will divest the landlord of such lien.[38]

§ 1331. **Levy of Distress Warrant not Necessary to Perfect Lien.** The court instructs the jury, that the law gives the landlord a lien upon the crops grown or growing upon the rented premises, in any one year, for the rent of that year; that such lien does not depend upon the levy of any distress warrant, but is given by the statute, and no creditor of the tenant can defeat the landlord's lien by levying an attachment or an execution upon the property before the issuing of a distress warrant by the landlord.[39]

35—Hume v. Simmons, 34 Fla. 584, 16 So. 552 (554).

"We are satisfied that the six months limitation prescribed in the seventeenth section of the act of 1887 applies to all actions for enforcing liens created by the third section of said act, the only one under which appellee can insist that he had any lien on the land, and, this being the case, the court erred in refusing to give the instruction asked by appellant."

36—Cross v. Kennedy, — Tex. Civ. App. —, 66 S. W. 318.

37—Thompson v. Mead, 67 Ill. 395; Parks v. Laurens Cotton Mills, 70 S. C. 274, 49 S. E. 871.

38—Miles v. James, 36 Ill. 399.

39—Mead v. Thompson, 78 Ill. 62.

Except as to growing crops, the lien of the landlord does not arise,

§ 1332. **Lien Against Purchaser From Tenant, When.** (a) And when a purchaser of corn from a tenant knows of the fact of tenancy, and that his vendor, as such tenant, had raised the corn on the demised premises, this will be notice to him of any lien the landlord may have upon the same for unpaid rent.[40]

(b) The court instructs the jury, that if they believe, from the evidence, that when the defendant purchased the grain in question he knew that A. B. rented from the plaintiff the land whereon the grain was raised, and that he neglected and failed to inquire into the facts regarding the plaintiff's lien thereon, to the extent that a reasonably prudent man should have done under the circumstances proved, then the jury should find for the plaintiff.[41]

§ 1333. **Lien on Product of Rented Lands—Knowledge of Purchaser—Series.** (a) The court charges the jury that a person is chargeable with knowledge of the landlord's lien who knows that the property purchased is the product of rented lands.

(b) If the jury believe from the evidence that S. rented the land called the "N. Place" from the plaintiff in the year ——, and raised cotton thereon and removed the same therefrom without paying the rent thereof for the said year, and without the consent of the plaintiff, and shipped the same to defendants, and they sold the same, and failed and refused to pay said rent to plaintiff, and the defendants, before they sold said cotton, had knowledge of any fact sufficient to put them on inquiry, which, if prosecuted with reasonable diligence, would have disclosed to them the fact that said cotton was raised on land rented by said S. from the plaintiff in said year, they must find for the plaintiff, and it is immaterial from what source, or by what method, or at what time, the information was obtained.

(c) If the jury believe from the evidence that the plaintiff consented to S. shipping and selling the cotton raised upon the rented place before paying the rent, then they ought to find a verdict for the defendants, and such consent may be expressed or implied from the dealings between the parties.

(d) The court charges the jury that any statement that S. may have made to the plaintiff to the effect that defendants had told him to ask plaintiff to extend the date of the payment of rent is no evidence as against them that defendants sent plaintiff any such message, and should not be considered by the jury as evidence that defendants sent any such message.

(e) The court charges the jury, that if defendants had no knowledge or notice of plaintiff's lien for rent, or of facts putting them

in Illinois, until levy of distress warrant. See Springer v. Lipsis, 110 Ill. App. 109, aff'd 209 Ill. 261, 70 N. E. 641.

40—Watt v. Scofield, 76 Ill. 261.

41—Prettyman v. Unland, 77 Ill. 206; Thomas v. Tucker, Zeve & Co., — Tex. Civ. App. —, 89 S. W. 802.

upon inquiry as to such lien, the jury ought to find a verdict for defendants.

(f) The court charges the jury that if they believe from the evidence, that S. shipped his cotton to defendants, and that they sold the cotton and accounted to S. for it by applying part of the proceeds to the payment of S.'s debt to defendants, and by paying S.'s drafts for the balance before plaintiff demanded his rent of defendant, the jury ought to find a verdict for defendants, unless they further believe that defendants knew that part of the cotton was raised upon rented land, or had notice of the fact that would reasonably put a merchant upon inquiry as to such rental, and which, if followed up by diligent inquiry, would have resulted in knowledge on the part of defendants of such renting, and the burden of proving such knowledge or notice would under the circumstances stated above be upon the plaintiff.[42]

§ 1334. **Mechanic's Lien—Brick-Making Machinery.** That if the jury from the evidence believes the facts to be that defendant G. Brick & Quarry Company acquired the lots which are in the petition and lien claim in this case described for the purpose of erecting thereon a plant for the manufacture of brick by the dry process; that at the time when defendant so acquired said lots there was standing thereon in an unfinished condition a building designed to be used in the manufacture of brick; that thereafter said defendant ordered from plaintiff the brick press mentioned in said petition, and also ordered from plaintiff the brick in said petition specified; that plaintiff delivered said brick to said defendant; and the same were at the instance of said defendant used in putting up necessary kilns for the completion of said plant; that plaintiff also brought to defendant's premises said press and so affixed and built the same into the building aforesaid that the same became a part thereof; that there was also attached to said building a boiler and engine room and boiler, engine and machinery necessary to operate said plant, and that said press was at the instance of said defendant connected with said machinery; that conveyors and other appliances were also, at the instance of said defendant placed in said premises and that thereby the said kilns were connected with said machinery and press; and that all of the erections pertaining to said plant were placed under one continuous and permanent roof, so that there would be no exposure to the elements of the machinery or material used in the manufacture of brick in said plant; and if the jury also be-

42—Foxworth v. Brown, 114 Ala. 299, 21 So. 413 (414).

Charges (a) and (b) were requested by plaintiff. The remaining instructions were requested by defendant. The court said:

"The first charge asked by plaintiff and refused asserts simply the correct proposition, that when a purchaser knows that the property purchased is the product of rented land, he is chargeable with knowledge of the landlord's lien and should have been given. Masterson v. Bentley, 60 Ala. 520; Boggs v. Price, 64 Ala. 519. We have examined the second charge asked by plaintiff and refused and can find no objection to it under the evidence and principles we have announced above."

lieves and finds that said connected building and erections as above described extended in part over or upon the several lots aforesaid,—then the jury should find that said buildings, press kilns, boiler, engine and machinery constitute one structure, and that the same and the lots of ground aforesaid are subject to a mechanic's lien for the full balance due the plaintiff for the press aforesaid, and work and labor of plaintiff connected therewith, and for the brick so delivered to defendant by plaintiff; and the jury will find that plaintiff is entitled to such lien, provided that plaintiff has by the evidence proved to the satisfaction of the jury all other averments of said petition essential to the establishment of a mechanic's lien.[43]

§ 1335. Mechanic's Lien—Assignment of Contract—Claim of Lien Filed by Assignor After Assignment. (a) The court instructs the jury that if they shall find and believe from the evidence, that prior to the 3d day of May, ——, the plaintiff, had acquired from D. Bros. the absolute ownership of the debt due them from H. on their contract with him, and did not hold the same as collateral security, merely, then D. Bros. had no right to a lien against defendant, the Pipe Company's property, and the lien paper filed by said D. Bros. on the 3d day of May, ——, and the subsequent assignment in writing thereof to plaintiff, were and are of no validity, and that the plaintiff is not entitled to a mechanic's lien against the property described in the petition.

(b) The court instructs the jury that, in order to entitle D. Bros. to perfect a mechanic's lien against the property of the defendant, the Pipe Company, these two things must have occurred: First, The defendant H. must, at the date said mechanic's lien paper was filed, have been indebted in some amount on his contract with said D. Bros.; second, said D. Bros. must at that time have been the owner of said debt against said H. No one except D. Bros. ever had any right to file a mechanic's lien based on the debt of H. to them, and in order to sustain the lien sought to be enforced in this case, the jury must find from the evidence that D. Bros. had not parted absolutely with their right to the debt due them from the defendant H. Hence if you find and believe from the evidence that the orders given by D. Bros. to plaintiff and dated respectively ——— and ———, were given by them and accepted by plaintiff with the intention of passing to the plaintiff all of their right and interest in the payments that were then due or might thereafter become due to them from said H., and not merely as security for their own indebtedness then due or to become due to the plaintiff, then the plaintiff is not entitled to a mechanic's lien in this case against the property in question.[44]

43—Progress P.-B. & M. Co. v. Gratiot B. & Q. Co., 151 Mo. 501, 52 S. W. 401 (402), 74 Am. St. Rep. 557.

44—Ittner v. Hughes, 154 Mo. 55, 55 S. W. 267 (269). The court said that the above "instructions when taken together contain a clear and accurate statement of the law governing the case."